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CRIME AND CORRECTION

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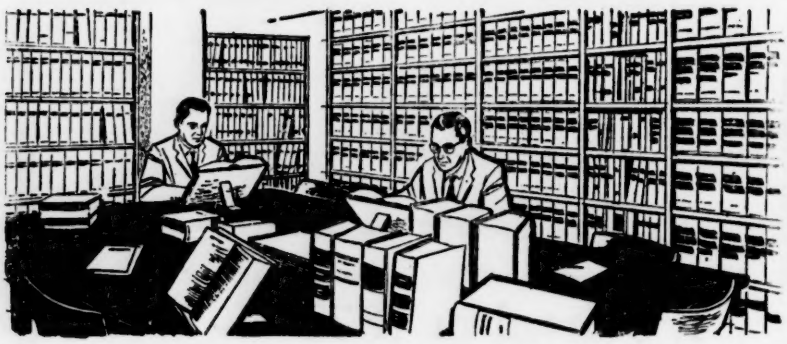

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LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

The definition of crime, an understanding of its causes, and the formulation of appropriate objectives and methods for the treatment of convicted offenders are patently matters of crucial social concern. A unified criminological theory that would answer these needs and, at the same time, command universal respect and adherence, however, has yet to emerge. Instead, a wide variety of particularistic theories abounds, each of which, as often as not, sharply contradicts or conflicts with every other. Thus, there is the so-called legalistic approach, predicated on the assumption that crime is an expression of free will, and correlatively advocating punitive sanctions. Contraposed is the so-called behavioristic approach, predicated on the assumption that crime is a product of forces not wholly within the control of the offender, and correlatively stressing such concepts as rehabilitation and individualized treatment.

Further divergence of approach stems from the growing dominance in our society of a viewpoint which conceives of the offender primarily in individualistic and psychological terms, according to which he is depicted as a person with a *sui generis* defect, principally, if not entirely, attributable to peculiar elements in his personal history. On the basis of this assumption, correction would require that the offender be isolated and his defect identified and remedied. This conception, however, seems largely to ignore the group character of the offender and the abundant evidence supporting the assertion that, as a group, offenders are no more defective than the general populace.

In practice, the procedures of the administration of justice tend in the direction of an unsatisfactory, uneasy, and vaguely-defined compromise of these differing theories. Nor have scholarly commentaries in this area been markedly illuminating, owing to the fact that commentators often gloss over or disregard incompatible orientations and frames of reference, or perhaps, in an access of tolerance, even adopt, perhaps without complete comprehension, the approaches of other disciplines. Accordingly, it has become difficult to determine the distinctive contribution that each of the particular disciplines has to offer and comparatively to appraise their underlying value premises.

This symposium, therefore, has been designed primarily to focus upon the diversity

of viewpoints prevalent in this area. To accomplish this, it seeks to present a strong, partisan exposition of the legal, psychiatric, and sociological viewpoints, respectively, followed by a critique of each. This broad, topical coverage is expected to subsume discussion of the many special problems in the area—the juvenile and the youthful offender, the habitual offender, the psychiatic or emotionally-deviated offender, and others. The only special problem that is specifically discussed is white-collar crime, which is rather unique and involves rather distinctive considerations.

The balance of the symposium purports to examine the nature and effectiveness of contemporary correctional practice, and possibly point the way to future improvement. In this latter connection, the constructive role that properly-conducted research may play is recognized—indeed, emphasized—although it is not suggested, by any means, that this will afford a panacea. Efficient means of implementing research results must also be devised, and here, serious administrative obstacles may be encountered.

As an ultimate goal, the integration of legal principles and scientific knowledge in the area of crime and correction enjoys widespread approbation. It is the belief of the editors that the articulation and criticism of the competing criminological theories elaborated in this symposium may further cross-disciplinary communication, understanding, and appreciation and perhaps, in a small way, conduce an eventual accommodation. To this end, this issue is hopefully directed.

MELVIN G. SHIMM.

CORRECTION IN HISTORICAL PERSPECTIVE

THORSTEN SELLIN*

I

INTRODUCTION

A study of the changes that have occurred in our ideas of how to deal with offenders against the criminal law brings us into contact with one of the most fascinating and challenging aspects of social history, the history of punishment. It is, by and large, a sordid history; a record of our slow progress in finding effective means of reducing criminality by punishment; a record of much violence, brutality, torture, and indifference to human suffering, but also of charity, compassion, and honest search for methods of correctional treatment that will salvage rather than destroy those who are its objects. It is the purpose of this paper to attempt to disengage a few of the general trends that are discernible in that record and lay bare some of the conspicuous elements that compose these trends, especially since the Middle Ages.

To the casual student of the history of punishment and of the reasons given for its existence, character, and myriad forms, it would appear that there are two noticeable *purposes* of punishment and that while they are different in kind, they are not always completely separable. One of these purposes is the protection and conservation of the social interests or values which have been injured by the offender. It is a mundane purpose, nowadays often designated, especially abroad, by the term of social defense. This protection is thought to be achievable by various *means,* such as (a) the extermination of the offender; (b) making him so fear punishment that he will commit no more crimes (deterrence); or (c) reforming, re-educating, or curing him by more positive methods. The second purpose is other-worldly, so to speak. It views punishment as being inflicted in order to save the offender's soul, this end being achieved by his repentance and atonement.

Next, we must consider the human *motives,* wishes, and desires that have led us to establish and apply punishments that would effect the means and thereby achieve the purposes or ends thereof. Prominent among these motive forces have been (a) a primitive desire for vengeance or retaliation; (b) compassion with sinners

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or unfortunate fellowmen; (c) a wish to exploit the offender's productive capacities; and (d) the hope to turn him into a law-abiding citizen by some kind of rational treatment or therapy.

Even though a case could be made for the claim that these purposes, means, and motives have always existed in the civilized world, history suggests that their respective shares in the scheme of things have not at all times been of equal proportions. Although there have been times and places when the salvation of the soul of the criminal may have appeared to be the main aim of punishment, the "protection of society" has usually been the dominant purpose, the more so as man has proceeded to exchange his fear of the unknown for a confidence in his ability to penetrate it. As for means and motives, their interplay and the roles of their constituent parts have undergone great changes in the course of time. Indeed, the story of the changes in social attitudes toward the offender is essentially the story of how the roles of the various means and motives of punishments have progressively lost or gained in importance.

And that story is inextricably interwoven with the history of cultural change in general; for the nature of punishments and the motives behind them reflect the fundamental character of the structure, the institutions, and the intellectual life of society; as these change, so do attitudes toward offenders, as well as the resultant ways of dealing with them. In surveying these last-mentioned changes, we shall examine separately (a) the retaliatory, (b) the exploitative, (c) the humanitarian, and (d) the re-educational-therapeutic elements in punishment. It is hoped that this examination will reveal something of the interrelationships and relative strength of these elements at different periods. The history we are studying is not like a ladder, on which each rung marks a clear division between one stage and the one above. It is more like a river, arising from several tributaries, some of which, owing to the operation of changing climatic factors, tend to grow more powerful, while others show signs of drying up; yet, all are adding their respective flow to the main stream.

II

THE RETALIATORY ELEMENT

No punishments illustrate the retaliatory element better than do capital and corporal penalties. The supreme penalty of death may well be the oldest of all punishments. In historical times, the manner of inflicting it has taken all conceivable forms, some of them designed to snuff out life speedily, others planned so as to prolong the agony of the victim as much as possible. The executioner's sword and the hangman's rope have been reasonably rapid methods, but those who have been burned at the stake, boiled or buried alive, broken on the wheel, or immured have known the full meaning of public vengeance and retaliation.

However, this penalty has undergone great changes in the last few hundred years and especially during the last century and a half. Where it was once employed

in the case of all serious crimes in all nations, it has gradually become limited to very few crimes or has been abolished altogether.

Statistical data on the relative use of the death penalty in early times are rare, especially long-time series which indicate trends. A most interesting series of this kind, and the longest reliable one so far produced, unfortunately applies to only one community, the town of Malines in Belgium. It covers five centuries before the French Revolution and, therefore, antedates the more recent abolitionist trend. During these centuries, Malines had a population that remained rather constant in size, and the criminal law which it administered underwent no radical changes. Nevertheless, the annual average number of executions dropped from four during 1370-1400, to two during the sixteenth century, to one every four years during the eighteenth century.[1] There are good reasons for believing that this phenomenon was no isolated one, but was occurring in the rest of Europe.

It has been estimated that during the 150 years beginning with the reign of Henry VIII in England and ending with the Commonwealth, the annual average of 300 executions at Tyburn (London and Middlesex) during the first half century dropped to ninety during the last thirty-five years. A century later, during the five decades 1749-98, the annual average number of criminals executed in London and Middlesex each decade ran to thirty-one, twenty-one, thirty-six, fifty-three, and twenty-one, respectively. Most of the executions were for crimes against property.[2]

A growing sentiment against the death penalty manifested itself during the latter half of the eighteenth century. The philosophers of the Enlightenment gave it voice. Becarria's essay *On Crimes and Punishments* (1764) was not the first to advocate the removal of this penalty, but it was written at a time when the soil was ready to receive the seed it planted. It took several decades for its influence to be fully felt. During the nineteenth century, however, the death penalty was abolished in many countries or otherwise reduced in scope. This general trend has continued to the present day, in spite of local and temporary reversals, until we must conclude that what was once a highly acceptable method of dealing with criminals has become archaic in our Western culture and a vestigial organ in our body politic.

Today, the death penalty has survived in Western Europe only in the British Isles, France, and Spain. The largest and most populous states of Central and South America have abandoned it. Canada still retains it, but in the United States, it is not found in seven states and has fallen into disuse in several others. What has happened in the United States illustrates the trend of events. First of all, there has been a general tendency to reduce the number of crimes punishable by death, at least if we compare the situation today with that of a century ago. Where formerly the death penalty was mandatory in case of conviction and was so still in a dozen states at the end of the first World War, the mandatory provisions have now disappeared from all states, at least in the case of murder, and judge or jury

[1] Maes, *La peine de mort dans le droit criminel de Malines*, 28 REVUE HISTORIQUE DE DROIT FRANCAIS ET ÉTRANGER 372, 383 (4th ser. 1950).

[2] I LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 142, 147 (1948).

has been given the power to choose between the death penalty and some other punishment, usually life imprisonment. Executions have been made private, where formerly they were public, and this trend has been greatly accelerated by changing the method from hanging to electrocution or the gas chamber, which require more permanent installations. The traditional gallows, so characteristic of Anglo-American justice, have almost disappeared from the United States, owing to the belief that the other methods just mentioned are more "humane." Finally, a few states have altogether done away with the death penalty. Michigan was the first to do so, in 1846, followed a few years later by Maine. By 1900, six states were in the abolitionist ranks. A strong movement in a considerable number of states about the time of the first World War increased the number to twelve in 1918; but two years later, there were but eight left; and by 1937, the figure had, again, gone down to six.

In 1958, Delaware abolished the death penalty, the first state to do so in more than three decades. Sentiment for the removal of this punishment has again been growing, and there are many signs to indicate that some of our largest states are likely to follow Delaware's lead in the next few years. Such signs are apparent in California, New York, Illinois, and Massachusetts, for instance. Perhaps this is less surprising when we recall that the number of capital executions in our country has declined from over 150 a year in the early part of the 1930's to sixty-five in 1957. Similar trends are noticeable both in France and in England. The simple fact seems to be that the death penalty has become incompatible with other ideas of how to deal with offenders.[3]

What has been said about the death penalty is even more true of corporal punishments. Since imprisonment was an uncommon form of punishment prior to the eighteenth century, corporal punishments ranked next to the capital ones in importance. Branding, mutilation, and flogging were frequently in use. Only flogging has survived here and there in our Western culture. The whip did not disappear from British law until 1948, and it is still a legal form of punishment in Canada and some other Commonwealth countries, such as the Union of South Africa and Ceylon. Mutilation is still practiced in some parts of the Moslem world. In the United States, the traditional forms survived in several northern states until the early decades of the last century and in the South until some time after the Civil War. Delaware still retains the whipping post, but uses it only rarely nowadays. Indeed, that is something of an anachronism considering the step recently taken by Delaware to abolish the death penalty.

The retaliatory element is, of course, present in greater or lesser degree in other than capital or corporal punishments. It is present whenever the punishment inflicts suffering without regard to the offender's future rehabilitation, and it is clearly reflected in the vicious sentences to long prison terms that tend to be demanded and imposed when public sentiments have been aroused by some brutal crimes.

[3] For a more detailed discussion of the death penalty, its history, extent, rationale, and effectiveness, here and abroad, see the symposium, *Murder and the Penalty of Death*, 284 ANNALS (1952).

III

THE EXPLOITATIVE ELEMENT

Those who today complain that our prisons are great financial burdens on the taxpayer might well be surprised to learn that the use of prisons in connection with punishments developed for the purpose of exploiting the manpower of criminals and making them financially profitable. The use of criminals to build roads, fortifications, and public works goes back to ancient times. In ancient Rome, criminals were sometimes sent to labor in the mines and quarries. Mining continued, in many countries, to be a favorite way of exploiting criminals, partly because of the hazards such labor involved, and it is a curious fact that the first state prison in the United States—in Connecticut—was in a mine. Whatever might have been the form of exploitation, it is obvious that when such criminals were not engaged in work, they had to remain confined somewhere if they were to be counted on to complete their tasks; hence, the need for prisons that were mere places for the safekeeping of these unwilling laborers.

Perhaps the best illustration of penal servitude is the system of galley slavery which was introduced toward the end of the Middle Ages in the countries bordering on the Mediterranean Sea. The practice seems to have begun in France shortly before the middle of the fifteenth century and spread from there to nearby maritime countries. Gradually, many criminals who would otherwise have been sentenced to death or corporal punishments were committed to the galleys, warships peculiarly suited to the Mediterranean and propelled by rowers.

Numerous other illustrations could be given. The first state prisons in the United States were set up as institutions for the confinement of criminals sentenced to perform hard labor, and until relatively recent times, and still in some states, one of the chief elements of punishment has remained the financial exploitation of the prisoner's manpower. We need only mention the lease system of prison labor, which was not completely abolished until thirty-five years ago, and the system of contract labor for the benefit of private employers, which remained in many states until twenty-five years ago. The chain gangs are still remembered, and there can be little doubt that in many places, the improvements in living conditions in prison road camps has in part been motivated more by a need for maintaining healthy work crews than by a desire to rehabilitate offenders.

IV

THE HUMANITARIAN ELEMENT

Humanitarian sentiments and feelings have played a large role in the transformation of punishments, especially since the beginning of the Christian era, for these feelings are closely bound up with religious beliefs. Charitable agencies, societies, etc., developed quite early for the purpose of bringing solace in some form to poor

prisoners, visiting them, ransoming them, and burying them. All the early prison reformers were motivated by Christian charity and compassion, and these sentiments played a large role in the movement to reduce the use of corporal and capital punishments, improve conditions in jails, and lighten the burdens of imprisonment. The first programs of education of prisoners aimed to teach them to read religious books, and the first prison libraries were chiefly stocked with devotional literature. Humanitarian sentiments were largely responsible for the introduction of medical services to prisoners. The first prison society in the United States was formed to "alleviate the miseries of public prisons." Indeed, until recent times, penal reform has been to a large extent dictated not by a carefully studied plan to develop effective penal treatment, but by humanitarian sentiments.

V

THE TREATMENT ELEMENT

The greatest changes in our attitudes toward the offender have occurred during the last two centuries. They are attributable to two great movements which can be roughly traced back to ideas that reached fruition or were being foreshadowed in the late eighteenth century—the rise of a philosophy of democracy and the birth of the behavioral sciences. The former led to great political upheavals, and the latter produced a revolution in our views regarding the nature of the offender and his treatment.

The rationalists of the eighteenth century were convinced that research would be able to uncover not only the scientific laws that governed the inanimate world, but the laws that ruled social life and the behavior of man. The fumbling efforts to understand human behavior by physiognomics that culminated in the work of Lavater became more systematic in the researches of Gall, the father of "phrenology," whose ideas are no longer acceptable, but who fully understood their implications for penology. The leading brain anatomist of his age, Gall became convinced that the explanation of all human behavior was to be found in the structure of the brain; his studies of criminals confirmed him in that belief. It is not very important that his theories could not be substantiated, but it is important that they caused him to stress the need for the individualization of punishment. He regarded it as axiomatic that punishment should be fitted not only to the crime, but to the criminal as well, just as physicians who have diagnosed a disease must consider the nature of the patient when prescribing treatment.

In the demand for individualization of punishment, he received ample support from the infant science of psychiatry. Not long after the American Revolution, Benjamin Rush had studied what he called the diseases of the moral faculty. What he called anomia developed later in the clinical studies of Pinel, Esquirol, and Pritchard into what came to be known as moral insanity, a conception of the cause

of crime which definitely placed the criminal into the category of the mentally diseased and hence in need for preventive care rather than punishment.

There is no need to describe here in any great detail the variety of researches or theories about the causation of crime which flourished during the last century nor their successors during the present century. Suffice it to say that whether we consider the individualistic theories of the criminal anthropologists, the hereditarians, the psychoanalysts, or the psychologists or the environmental theories of the positivists, the Marxians, the sociologists, and others, they all pointed in the same direction so far as the penal system was concerned; they all demanded that punishment be fitted to the punished and not to the crime, broadly speaking. To the investigators of the matrix and phenomena of human behavior, criminals were not all alike and should not be treated as if they were. The fact that two persons had committed the same crime was not, to them, a sound reason for giving them the same punishment. And as scientists, they easily arrived at the conclusion that the criminal should not be sentenced to a fixed and unalterable punishment, but that his correctional treatment should have flexibility if it were to meet society's demand for protection against him and to serve best his need for effective therapy.

It is obvious, that whatever humanitarian sentiments may have lurked in the recesses of the minds of those who called for a scientific basis for the treatment of the offender, this basis was not that of the humanitarians, nor of the retaliators or the exploiters. And who would question the enormous influence that the scientific movement has had on our penal system? We need only to look at the innovations of the last century to see how different the correctional system of a modern state is as compared with that of earlier days. At the beginning of the nineteenth century, fines, one or two forms of imprisonment, the death penalty, and perhaps the lash were the usual punishments; today, a variety of specialized institutions, probation, indeterminate sentences, parole, juvenile courts, etc., testify to the impact which the behavioral sciences have had on our legislation. The concept of individualized treatment has received general acceptance—within limits which may be modifiable but certainly not removable during the foreseeable future.

The mention of these limits brings us back to the democratic movement. We are told by the legal historian that justice was marked by great arbitrariness prior to the nineteenth century, at least on the continent of Europe, and that it favored the ruling classes. The egalitarian political philosophy which matured during the eighteenth century brought significant changes. Even before Beccaria published his famous essay, Voltaire had called for the abolition of arbitrary punishments. Judges, he claimed should act on the basis of well-formulated laws, so that citizens would no longer have to complain of arbitrary justice and judges would not have to fear the hatred of the people, since punishments would be dictated by law and not by the sentiments of the judge.[4]

[4] FRANÇOIS MARIE AROUET DE VOLTAIRE, IDÉES RÉPUBLICAINES xl (1762).

Beccaria clarified the issue still further. Criminal law should be based, he said, on the concept of the equality of men. Definite punishments should be fixed by laws adopted by representatives of a political society based on the social contract. Courts should determine the guilt of the accused, but should not be allowed to interpret the law, since nothing would be more dangerous than to judge in accord with the "spirit of the law," for in that case, this spirit would depend on the judge's good or bad logic, his good or bad digestion, the strength of his emotions, or the frailties of the accused. The same judge might even, at times, impose different punishments for the same crime! There might be some inconveniences in the literal application of the law, but the legislature could always change it. Otherwise, the accused would become the slave of the judge. Exact punishments would also be most intimidating; therefore, a criminal code should be precise and clear. Parallel scales of crimes and punishments should be devised, and the degree of the offender's injury to society should determine the severity of his punishment.[5]

The impact of these ideas to which Becarria gave such a felicitous expression soon became apparent in the various reforms of the penal law which were made in the late eighteenth and the early nineteenth century in most countries. From the point of view of political philosophy, this was a victory for the demands of democracy, for the equality of all persons before the law, and for the principle of legality. From the point of view of penology, it meant the shift from capital and corporal punishments and torture, which were looked upon as instrumentalities of a feudal age, to punishments consisting of the deprivation of liberty and, therefore, more fitting for persons who had by their crimes forfeited their right to enjoy the privilege of freedom. The simple hedonistic philosophy by which Beccaria explained human motivation—and which Jeremy Bentham later was to make the foundation for his penal system—no doubt could have provided him with a basis for constructing a system requiring the individualization of punishment, but the intellectual climate of his day was not favorable. Dominated by the emerging political philosophy, he arrived at the antithesis of individualization—namely, equal punishments for equal crimes, the nature of the crime being the measure of the injury done by a criminal to society.

There is little need for stressing the fact that the penal philosophy embraced by the egalitarians and the correctional or treatment philosophy derived from the behavioral scientists are mutually incompatible. We have already noted the effect of the behavioral sciences on the penal system. A corollary effect may be noted in the administration of justice. With the increase of the number and variety of possible dispositions available to the courts, the arbitrary power of courts, which the egalitarians were desirous of destroying because of their mistrust of these agencies, has increased, and more and more discretionary power has been transferred to agencies of correctional administration.

[5] CESARE BONESANA BECCARIA, DEI DELITTI E DELLE PENE par. 2 (1764).

VI

CONCLUSION

The history of penal legislation during the last century has been one of compromise. The treatment philosophy has constantly made more inroads, but has now reached the point of diminishing returns, one might say. The hard core of the older philosophy which demands a life for a life or at least life imprisonment for a life and a considerable degree of proportionality between the seriousness of the crime and the severity of the punishment still remains strong, however.

THE LEGAL APPROACH TO CRIME AND CORRECTION

JOHN BARKER WAITE*

The assigned subject of this paper—the legal approach to crime and correction—is cryptic at best. Max Beerbohm might have called it inenubilous. Hence, the writer has arbitrarily assumed that it raises the problem of what law-makers *ought* to do about crime and correction. That might cover a multiplicity of included problems: Who are the makers of law, for example? On what theory and with what purpose in mind should they define particular acts as criminal? What should be included? How should the fact of forbidden action and the identity of the actor be determined? What consequences ought wisely to be imposed on the actors who are discovered? In short, it might encompass the whole field of criminal law: subjective, procedural, and punitive.

But the writer has no intention herein of struggling with the whole field. The makers of law, for example, need not be discussed, though at another point, some comment will be made on some judge-made rules. Indeed, as the writer hopes to make clear, the judicial attitude toward crime is considerably more closely related to the amount of crime committed than is legislative enactment.

Similarly, the problems of substantive law can also be ignored, for two reasons: In the first place, the writer presumes that "approach" to crime connotes chiefly what can be done to reduce its frequency. But no appreciable amount of crime today can be attributed to insufficiency, uncertainty, or indefiniteness in what the law makes criminal. Hence, need to discuss substantive phases of the law is at once eliminated.[1] Some minor changes will always be currently desirable, but no material improvement in crime prevention can be accomplished by improvement in the definition of crime. In the second place, whatever can be done in the substantive law field has already been undertaken by an able committee under auspices of the American Law Institute. Its Model Penal Code is setting out the conventional conduct prohibitions with remarkable precision, definiteness, clarity, sufficiency, and readability. A few old prohibitions will be dropped, and a few new ones added. When finished, however, its content will be a thoroughly clear, complete, and satisfactory formulation of substantive criminal law.

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[1] This limitation of the topic to crime reduction also, happily, eliminates need for a disquisition on "insanity" as developed in Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954), a notion so utterly inconsistent with the justifications of existing criminal law—except that of expiation—that if it be adopted, an entirely new legal approach to crime will be required.

Of the procedural law and its approach to crime, too, little need be said. Supposedly ideal rules of procedure were formulated by a committee of the American Law Institute and presented in 1930.[2] Some of its provisions have been adopted in a number of states; to a considerable extent, the formulation itself embodied what was already the law in many states. Failures in the procedure of conviction are still regrettably frequent and are, to some extent, responsible for ineffectiveness of prevention.[3] For the most part, however, these failures are so far attributable to the human beings involved—to the methods of prosecution and defense, to the dilatoriness of attorneys, to the absence of control by judges—that correction by mere alteration and amendment in the procedural law itself is hard to envision.[4]

For such reasons, the writer will limit himself to a discussion of the following three postulates:

1. Mere punishment does not satisfactorily deter crime; it never has, and it cannot be made to do so.

2. The frequency of first crime can be reduced if judges will use their appellate powers to the end of restraining rather than encouraging it.

3. Repetitious criminality can be materially diminished by the use of methods which are more than punishment.

I

PUNISHMENT AS A CRIME PREVENTIVE

The prospect of physical ill-consequence never has deterred men from seeking gain, whether through crime or otherwise. They took the trails to Santa Fe despite the danger of Comanche torture. They climbed the Chilkoot Pass for gold over the frozen bodies of their predecessors. They went from Dan to Beersheba, between Scylla and Charybdis, across the Gobi Desert. After Henry VIII had executed 16,000 malefactors and hung their bodies in chains for the world to see, still 16,000 more are said to have come undeterred down the paths of crime to his axe and gibbet. The galleys of the Christians were filled with convicts as well as captives;

[2] ALI CODE OF CRIMINAL PROCEDURE (1930).

[3] The *Uniform Crime Reports* for 1956 reveal the commission of 2,563,150 major crimes known to the police. FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 67 (1957). The 1957 report of the Federal Bureau of Prisons shows only 77,029 persons committed to the federal and state prisons by the courts. U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, FEDERAL PRISONS 1957, at 98 (1958). That does not mean, of course, that nearly two and a half million criminals went unpunished. Some were sent to juvenile institutions, some only fined, many placed on probation. Nor was each offense the work of a different man. Many were guilty of ten or several times ten crimes before they were caught. But the figures do indicate much about the probability of punishment.

[4] In 1935, an American Bar Association committee returned a report, *Improvement of Personnel in Criminal Law Enforcement*, which, among other recommendations, suggested the encouragement of organizations, carefully shielded against bias, partisanship, or political control, to observe and publicize the facts concerning administration of criminal justice, at least where the truth is not otherwise readily discoverable by the general public. When this recommendation came before the Association meeting, Charles A. Beardsley, delegate from California, protested: ". . . as far as our Association is concerned we have troubles enough of our own without advocating the forming of lay organizations to watch what we are doing." Without further discussion, the recommendation was rejected. 61 A.B.A. REP. 330 (1936).

the horrendous prisons of an earlier day never lacked prisoners sentenced for crime. When Bruno Richard Hauptmann had been executed following the Lindbergh kidnaping, the frequency of kidnapings increased. In 1950, the Detroit judges, disgusted with the failure of monetary fines to check automobile traffic offenses, instituted a "crack-down" by way of jail sentences. At the end of six months, they had sent 2,000 drivers to jail—without any diminution in the number of violators brought before them.[5]

Whether men fail to perceive the possibilities of ill-consequence in what they want to do, or, perceiving it, deny the danger to themselves, is for psychology, not law, to answer. The Psalmist suggested the latter, before psychology was a science: "A thousand shall fall at thy side, and ten thousand at thy right hand; but it shall not come nigh thee."[6] But whatever the reason, the threat of punishment for crime committed is not an effective or satisfactory deterrent.

II

THE JUDICIAL FUNCTION IN CRIME PREVENTION

Something, however, does effectively restrain most men from crime; and the most potent influence we know is the innate tendency of human beings to conform with the beliefs of their group. Every normal man is inclined to follow his group conventions, to walk in the ruts of its traditions, to conduct himself in avoidance of group condemnation. It makes the Amish forego use of buttons; Jehovah's Witnesses refuse to fight in war. It leads one man always to wear a tie; encourages another to wear no tie at all. It brings motorists to a stop when traffic lights are red, though there is no power of enforcement in sight. Some years ago, I asked England's director of public prosecutions why the English police did not carry pistols, if only as a matter of self-protection. He considered it amply sufficient explanation to say that weapons were unnecessary, because "our people would be greatly distressed if anyone were to attack an officer."

This tendency to conform is given many names, but its force is recognized:[7]

> If a youngster doesn't take a dollar which just fell out of his mother's purse because he is afraid of getting caught and being thrashed, then we would say that it is his "ego" which limited his possessive urge along the line of "reality consequences." If a youngster doesn't take that dollar, even though he is certain nobody would ever find out, because he would feel bad to do anything which he considers to be a sin, such as stealing, then we would credit his "superego" with the success in impulse control.

It has also been called "conscience." But,[8]

[5] It is apparent that the frequency of punishment did not represent group condemnation of such activity. There is, as yet, no general hostility toward violation of the speed laws, though continued judicial condemnation could help create it. The results of California's current experiment should be interesting. See Knight, *We Jail Drunken Drivers,* Saturday Evening Post, April 26, 1958, p. 31.

[6] PSALMS 91:7.

[7] FRITZ REDL & DAVID WINEMAN, CHILDREN WHO HATE 61 (1951).

[8] I MICHEL DE MONTAIGNE, ESSAYS c. 23.

the laws of conscience which we claim are born of nature are born of custom; everyone having an inward veneration for the opinions and mores approved and accepted among his own people, and cannot, without very great reluctance, depart from them, nor apply himself to them without applause.

This inhibiting factor, this "superego" or "conscience," if you will, rather than any fear of physical punishment, is what restrains men from conduct which their group chooses to call criminal.

When group conventions are strong and clear, conformity is commonplace. When they are weak or uncertain, individual inhibitions more frequently fail; the "law's" control of conduct is lost. British popular hostility toward interference with their police made police weapons unnecessary, but when the British public was unsympathetic with the customs tax on rum and tobacco, no vigor of enforcement was able effectively to control smuggling. And during our own Prohibition experiment, though drivers might voluntarily stop for traffic lights, men persistently risked heavy penalties to buy unlawful liquor.

Law merely gives formal expression to these group beliefs, sentiments, and customs. They are embodied in statute and are voiced anew in every judicial decision:[9]

The sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax. It converts into a permanent final judgment what might otherwise be a transient sentiment. . . . In short, the infliction of punishment gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular . . . sanction.

Further,[10]

the stamping of an act as an offense the commission of which the State will prosecute with unrelenting severity, immediately arouses the feeling that the act is unsuitable, inadmissible, disreputable, contrary to duty . . . making the consciousness of right sharper, intensifying the general feeling for right and wrong.

This may be why Soviet law permits judges to deal with certain offenses by "public rebuke."[11]

But if judges choose to palliate a proved offense, they can wreak havoc with the restraining influence of group belief. They, in theory at least, speak for the group. If judges do not condemn what has been done, the group presumably does not disapprove it. If judges fail to rebuke, the public's disapproval is denied, group condemnation is belied, and the restraints of inhibition are dissipated. Every failure to impose punishment when it is demonstrably due, every judicial refusal to convict when guilt is clear, must appear to the public as a palliation of the offense. This truth acquires maximum importance from the shocking frequency with which appellate judges do refuse the punishment of obviously guilty criminals. Space, of

[9] 2 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 79 (1883).
[10] GUSTAV ASCHAFFENBURG, CRIME AND ITS REPRESSION 259 (1913).
[11] JUDAH ZELITCH, SOVIET ADMINISTRATION OF THE CRIMINAL LAW 81 (1931).

course, does not permit the exposition of even a small proportion of such cases, but they may, perhaps, be characterized by a few illustrations.

Some judges appear to have been psychologically obsessed with narrow technicalities, reversing because the charge was theft of a "cow, or animal of the cow kind," and the stolen steer, being male, was not of the cow kind.[12] Or because, though the jury had convicted on all fifty counts in an accusation of liquor law violation, the defendant's name had been correctly spelled Goldberg in forty-nine counts and Holdberg in the fiftieth.[13] Or because, though the evidence "would not have proved any fact of the least value in the case had it been properly admitted," its rejection was a breach of rule.[14]

The time was when Sir James Stephen could say of such technicalities that "their tendency was to make the administration of justice a solemn farce."[15] Quite possibly, the judges at this time did not really belie the popular feeling about crime and criminals, for the declared law itself was not representative of popular opinion. It was the enactments of a period when the Bishop of Rochester could blandly ask in Parliament the rhetorical question, "What have the masses to do with a law save to obey it?" But law today is supposed to represent the popular beliefs and does, in fact, for the most part, represent them. And what could more flatly belie the public opinion as to murder than the voices of Texas judges in 1945? They reversed a conviction of murder by drowning because the indictment "failed to allege whether the deceased was drowned in water, coffee, tea, or what."[16] Again, a year later, they upset conviction of a man who had kicked and stamped an elderly woman to death because he had not been told by the indictment that he did the stamping with his feet.[17]

It is not to be supposed that decisions such as these will encourage anyone to murder, rape, and arson. But judicial indifference toward any serious crime, or repeated judicial pecking at the conventions, ideals, and beliefs which give form to the public conscience must, in time, change men's attitude toward all legal standards of conduct. And judicial decisions do keep pecking away, belittling the wrongfulness of prohibited conduct, palliating it by unnecessary refusal to allow conviction.[18]

[12] These and many similar extravagances are noted in Perkins, *Absurdities in Criminal Procedure*, 11 IOWA L. REV. 297 (1926).

[13] People v. Goldberg, 287 Ill. 238, 122 N.E. 530 (1919).

[14] Masters v. Marsh, 19 Neb. 458, 27 N.W. 438 (1886).

[15] 1 STEPHEN, *op. cit. supra* note 9, at 284.

[16] Gragg v. State, 148 Tex. Crim. App. 267, 186 S.W.2d 243 (1945).

[17] Northern v. State, 203 S.W.2d 206 (Tex. Crim. App. 1946).

[18] Such judicial attitudes may be a large factor in the present attitude of youth toward crime. If judges do not take it seriously, why should youth? *E.g.*, "Elkhart, Ind.—A youth club requiring commission of a crime as a condition of membership was broken today, with three members under sentence. . . . The police have a roster of 30 club members, two thirds of whom have been charged with major crimes." Associated Press, April 9, 1958.

"'Something like 40 high school boys have been involved in larceny from 20 stores,' Ann Arbor Police Chief Caspar Enkeman told the Board of Education. . . . He pointed out that most of the boys come from good homes and can afford to buy what they need. The only comparable thing we have had were recent robberies involving a group of young girls." Ann Arbor (Mich.) News, April 10, 1958.

"We've told most of our security officers to stop watching for shoplifters and start watching the clerks"—who are helping themselves to about 500 million a year. Wall Street Journal, April 29, 1958, p.

Attempt to commit crime, for example, has long been recognized as criminal in itself, even though it fails in its purpose. The only uncertainty is in the problem of what constitutes attempt. In as much as the basic purpose of punishment is threefold—to discourage crime by demonstration of its possible consequence, to prevent it by incapacitation while in prison, and to strengthen individual consciousness of wrong—one might suppose that judges would deal with attempts at crime as seriously as they do with crime itself, whenever possible within the provisions of law. But note the type of case wherein they could have done so but, without legal obligation, chose to exonerate the wrongdoer—and thereby to palliate his wrongdoing.

Rizzo, who knew where to lay the finger on a paymaster, Dorio, who could get a car, and Milo and Tomasello, who had pistols, combined assets and went after the money. They missed the paymaster at three places they tried. Then the police, suspicious of their actions, picked them up, and the four were convicted of attempted robbery. The appellate court began its opinion, "The police of the City of New York did excellent work in this case by preventing the commission of a serious crime," but then went on to reverse the conviction of Rizzo, who alone had appealed, and request of the governor the release of the other three from prison. "The law would fail in its purpose if it permitted these three men, whoever or whatever they are, to serve a sentence for a crime which the courts subsequently found and declared had not been committed."[19] Just what did Judge Crane think "the law's purpose" to be? And had no crime, no "attempt," been committed in fact?[20]

Charles Miller, a bit drunk, said to others, "If the people here look at things like that, I'm going to take the law in my hands. I'm going to kill the God-damned nigger." He got his rifle, walked to the field where the "nigger" was picking beans, stopped to load with a high-powered cartridge, and said, "When I shoot a black son of a bitch, I want something that will go through him." Before he got within shooting distance of his victim—while he was 200 yards distant—a local constable jumped him and took his gun away. The jury, the trial judge, and all three judges of the intermediate court thought Miller guilty of a criminal attempt, but the state supreme court judges reversed conviction and released him.[21]

Cosad, Crane, and Shear were charged with forcible rape of a young woman. The jury found them guilty of *attempted* rape. Here were three men, undeniably dangerous in the sense that every known criminal is presumably dangerous enough to require segregative treatment. Yet, all three went unpunished because appellate judges decided that they had actually succeeded in raping the girl and were not, therefore, technically guilty of an attempt.[22]

1, col. 6. The morally frightening increase of shoplifting by customers is revealed in *Manners and Morals —The Shoplifters*, Time, May 5, 1958, p. 19, cols. 2, and 3.

[19] People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927).

[20] The decision was in flat conflict with People v. Sullivan, 173 N.Y. 122, 65 N.E. 989 (1903).

[21] People v. Miller, 2 Cal.2d 527, 42 P.2d 308 (1935).

[22] People v. Cosad, 253 App. Div. 104, 1 N.Y.S.2d 132 (4th Dep't 1937). The defendants were never retried. These cases, and the problem of what legally constitutes attempts, are discussed in Waite, *Crime Prevention and Judicial Casuistry*, 5 HASTINGS L. J. 169 (1954).

No transcendent authority, no statute nor established precedent compelled any of these decisions. On only one narrow premise of the purpose of law can they, or the others like them, perhaps be justified. If the purpose of punishment were primarily retaliation for injury done, the first two at least were sound; for no injury to anyone occurred.[23] But to the extent that punishment is intended as a preventive of other crime, whether by deterrence through fear, or by segregation, or by the creation of restraining inhibitions, they completely defeat its purpose.

In another field, judicial toleration of offenders and indifference to their offenses are still more frequent and even more obvious. Appellate judges let known criminals go unpunished not through doubt of their guilt or through some uncertainty in the law, but simply to invest themselves with a power of control over the police. They seek to limit police behavior to what judges themselves, in their assumed wisdom, think proper. The writer concedes the duty of courts to protect individual freedom from improper executive intrusion. If the judges of Nazi Germany, or those of Communist Russia, had possessed the power and the courage to use it, the world might be happier today. But he also realizes that just what constitutes "improper" executive intrusion may be disputable and disputed. He would not himself accept Mr. Justice Murphy's objection to "laying bare to view the intimate personal matters" of a reasonably suspected criminal by methods of photography which can penetrate walls or overcome distance.[24] But even if one accepts such judicial notions of what is improper in police behavior, still the damage these judges do to social safety by trying to force their will upon the police is out of all proportion to any possible resultant good. They seriously interfere with police efficiency—a matter which is not here in issue.[25] But also, by their demonstrated indifference to crime, as compared with police behavior, they weaken that "conscience" which is the most effective crime preventive.

Consider, for instance, the 1955 case of *People v. Cahan*.[26] Los Angeles had suffered a gang war for control of numbers gambling. Not only had gambling itself become intolerably flagrant, but at least two murders and many vicious beatings were attributable to the struggle. The police were vigorous and apprehended nearly 500 organization underlings. But to break the gang, it was essential to get its top. Compellingly strong suspicion pointed to Charles H. Cahan. Day after day, for many weeks, the police quietly "tailed" him, but he gave away nothing. By tracing the gambler's paper supplies they discovered an office rented to Cahan's brother

[23] Judges are sometimes expressly, as well as subconsciously, motivated by the "tit for tat, tit for tat; kill my dog, I'll kill your cat" notion. *E.g.*, ". . . defendant was found guilty of murder in the first degree and adjudged to be hung in expiation of the crime." State v. Angelina, 73 W. Va. 146, 80 S.E. 141 (1913). ". . . if [New York] does not choose to avenge [the act], it is not for us to step in and do it for them." State v. Carter, 27 N.J.L. 499 (Sup. Ct. 1859).

[24] Goldman v. United States, 316 U.S. 129 (1942).

[25] Last November, a Washington, D. C., deputy chief of police, C. H. Lutz, resigned in frustration at the way police efficiency is "hobbled" by judges. "His vehement remarks drew a second from U. S. Attorney Oliver Gasch. The attorney blasted the enfeebling effects he said recent court decisions have had on local law enforcement." Washington Post and Times Herald, Nov. 21, 1957, p. 1, col. 3.

[26] 44 Cal.2d 434, 282 P.2d 905 (1955).

under an assumed name; but neither Cahan nor his brother came near it. With their chief's consent and approval, the police installed a dictaphone by which they were led to a residence containing another office. A dictaphone here, again with official consent, led them to the evidence needed for Cahan's conviction. There was no doubt of his guilt; but by a four to three decision, the state supreme court repudiated a century of established law, rejected the evidence, and set free that known racketeer and gambler.

Those judges disapproved use of the dictaphones—despite the peculiar difficulties of the case, the need for prompt and effective action, and the authorization by the police chief. Their disapproval suggests ivory-towered sensitivity, rather than awareness of actualities in the active war with crime.[27] But judges, like everyone else, are privileged to voice an opinion, unsound though it be. The real evil in their decision is the way in which they voiced their disapproval, not what they condemned. As a rebuke to the police for methods of which the judges personally disapproved, they made the public suffer. The ill consequence to social safety was immediate. The police were hampered in their protective efforts. More harmful still, the force of group condemnation, which normally encourages abstention from crime, was belied.[28]

This odd notion of controlling one man's conduct by refusal to punish someone else was not original with that California court. It developed through a striking bit of judicial law-making in the United States Supreme Court. Fremont Weeks, charged with unlawfully sending lottery tickets through the mails, was arrested at a railway station. Officers then went to the house where he lodged, borrowed a key, and searched his room. Because the lottery tickets they found were used in evidence, the Supreme Court reversed conviction.[29] The search, they said, was "unreasonable" for lack of a warrant; and evidence obtained by unreasonable search, they said, could not be used for conviction.

Again, no transcendent authority required either premise or conclusion. The Constitution does not define what constitutes unreasonableness of search, nor does it make a warrant requisite to reasonableness. What consequences shall follow an

[27] "Representative Kenneth B. Keating said today that a survey of wire tapping laws in other countries supported his view that some taps should be authorized here. . . . The overwhelming approval abroad of wiretapping by law enforcement agencies . . . indicates someone is out of step. It is time we got in step, and it is up to Congress to do that job." N. Y. Times, April 13, 1958, § 1, p. 58, col. 1. On May 8, 1958, he introduced two bills to legalize wire tapping by law enforcement agencies under proper safeguards. H.R. 12393 and 12394, 85th Cong., 2d Sess. (1958). See 104 CONG. REC. 7479 (daily ed. May 8, 1958). The New York constitutional privilege of police officers to tap the wires of suspected criminals is well discussed in Comment, *The 1957 New York Legislation on Wiretapping Problems*, 26 FORDHAM L. REV. 540 (1957); Comment, *Wire-tap Evidence—An Area of Admissibility*, 7 DE PAUL L. REV. 99 (1958).

[28] Police Chief William H. Parker soon reported that: "While major crime in Los Angeles decreased of 1955. . . . From January 1 through March 4, 1956, major felony crime in Los Angeles increased 36.6% over the same period last year." The worst effect, he added, was the increase of dope-peddling and gambling. Speech to the Ebell Club of Los Angeles, March 15, 1956. See also, Parker, *The California Crime Rise*, 47 J. CRIM. L., C. & P.S. 721 (1957).

[29] Weeks v. United States, 232 U.S. 383 (1914).

unreasonable search, the Constitution does not say. That the searcher shall not be protected by law from liability is implicit; but nothing more is even suggested. Hence, both in calling the search unreasonable and in forbidding use of the evidence obtained, the Court was no more than voicing the idiosyncratic conclusions of its judges.

That judge-made rule of evidence would probably have fallen into practical oblivion had not the appearance of national Prohibition given it new life. For a time, it was simply ignored by most state courts, rejected by those which did consider it. But even the high courts of justice were touched by the swirling hostilities toward effective enforcement of Prohibition and fear of its possible methods. A dozen state supreme courts, each one sitting in review of a liquor-law conviction, suddenly found theretofore unrecognized merit in the Supreme Court's exclusion notion and adopted it. A half dozen more followed suit in other types of cases. Judicial concepts of "unreasonableness" have gone into meticulous detail, and what was originally a discretionary conclusion has hardened into a rule. Moreover, the postulate of exclusion has been extended from the products of search to what is learned through other methods to which the judges object.[30]

What *good* this judicial attempt to control the police by indirection accomplishes is at most indeterminable.

> That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be more than a mild deterrent at best.[31]

The *evil* it produces is evident. Uncountable numbers of known bootleggers, gamblers, gun-toters, thieves, burglars, robbers, counterfeiters, and even killers have gone unpunished simply because appellate judges did not approve the ways in which

[30] The many decisions are discussed, Waite, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679 (1944); *Judges and the Crime Burden*, 54 *id.* at 169 (1955). By the notorious decision in United States v. Mallory, 354 U. S. 449, 455, 456 (1957), the Supreme Court freed a man convicted of vicious rape for no reason except that the police, instead of taking him promptly before a federal commissioner, as the statutes require, had held him from 2 p.m. until 10 p.m.—at which time they tried, but failed, to find one—and from then till morning. There was no pretense of abuse, compulsion, or other unlawful police action. "We cannot sanction this extended delay," said the Court; it has "evil potentialities." The Court could have castigated the police verbally. It could have advised action against them by the proper authorities, as New York's Court of Appeals asked action by the governor in the *Rizzo* case, *supra* note 20. Instead, it chose to rebuke police unlawfulness by release of a vicious criminal. Those justices must, therefore, have looked on rape as less socially condemnable than the technical misconduct of the police.

[31] Justice Jackson, in Irvine v. California, 347 U.S. 128, 136-37 (1954). Justice Clark added: ". . . we do not shape the conduct of local police one whit." *Id.* at 138. It is unlikely that judges who follow the exclusion practice will give it up without direction by statute. But it is not inconceivable; the California court in the *Cahan* case, *supra* note 27, repudiated a hundred years of decision in adopting the practice.

their guilt was discovered. The mere number of escapes is a social evil.[32] But more socially harmful still is the judicial comparison of police misconduct with vicious crime. By magnifying the one, they minimize and palliate the other. It must be remembered that all such decisions, whether based on procedural technicality or on wish to control the police, are the product of free judicial choice. In thus weighing the evil of crime against the evils of careless procedure or objectionable police action, and declaring crime the less serious, the judges inevitably affect the basic attitude of people toward all types of wrongdoing. Instead of stigmatizing crime as "unsuitable, inadmissible, disreputable," they dull the consciousness of right and they confuse, rather than strengthen, the general feeling for right and wrong.

In thus criticizing judicial attempts to create a right out of two wrongs, the writer is not proposing that judges cease their efforts to protect individuals from executive intrusion and administrative error. On the contrary, he would urge increased effort toward those ends, but by methods less costly and more effective. Though the judiciary lacks direct authority over executive officers, it does have powers of control by indirection more potentially effective than the back-door process of releasing felons. Judicial voicing of direct, publicized, and emphatic rebuke of policemen, commissioners, or incompetent prosecuting attorneys would produce far more certain results. In addition, judicial will, directed to such an end, could materially facilitate the ease and success of direct action by anyone—except caught criminals—whose rights might be invaded. In such methods should lie ample protection.

But certainly, only when judges apprehend the true function of punishment; only when they appreciate the tendency of men to conform with group ideas of right conduct; and only when they strive to clarify, crystallize, and strengthen those group ideas, instead of clouding and belittling them—only then, can society hope for reduction in the amount of first crime committed.

III

PREVENTION OF REPEATED CRIME

Repeated crime is a different problem. The forces which might have restrained first crime have been spent; conscience has failed; respect for group opinion has already been lost; punishment once suffered is less fearful than before. For one reason or another, repeated wrongdoing, despite punishment already experienced, is commonplace. It amounts, in fact, to a shocking proportion of all crime committed. Every penitentiary in the country is filled with men who have been in prison from one to ten times before. In those of a dozen states, more than half the inmates are repeaters:[33]

[32] For the escape of gun-toters, see Waite, *Public Policy and the Arrest of Felons*, 31 MICH. L. REV. 749 (1933).

[33] Introductory Explanation in ALI YOUTH CORRECTION AUTHORITY ACT (1940). "A person once punished for a crime is from a statistical point of view much more likely to commit a crime than one who has never been punished. In other words, a person is more likely to become a second offender

Of the prisoners in the Eastern Penitentiary of Pennsylvania during one year 67% had previously been convicted and served time. In the Massachusetts State Prison, 70% had previously been imprisoned. In New York 80% of the men sentenced to prison by courts had previous records; 2703 had been arrested 10,766 times. The jail population in Michigan consists of 63% repeaters; in Washington, D. C., 70% repeaters; in Louisiana 80% repeaters.

Specific instances prove little, but are frequently illuminating. In the writer's own files are the records of one man who into thirty-seven years of life had crowded six penitentiary terms; another with nine commitments for such offenses as auto theft, burglary and robbery; another whom five long terms for burglary failed to deter from a sixth burglary, coupled with attempted murder. Every prison file is replete with similar records. The report of the Federal Bureau of Prisons for 1956 says succinctly: "Of the 10,161 prisoners received in Federal institutions under sentence of more than one year, 6,452 or 63.5 per cent, had served one or more previous terms in some type or types of correctional institutions. . . ."[34] In the field of petty misdemeanors, more than one public nuisance has exceeded the one hundred mark in repeated offenses and repeated punishments. Ogden Nash rhymed a sound philosophy:[35]

> Experience is a futile teacher,
> Experience is a prosy preacher,
> Experience is a fruit tree fruitless,
> Experience is a shoe-tree bootless.
>
> . . . .
>
> He who has never tasted jail
> Lives well within the legal pale,
> While he who's served a heavy sentence,
> Renews the racket, not repentance.

Something more than punishment is needed to pull repeaters from that stage army of offenders and end their interminable march through courts and prison. The basic procedure of punishment—imprisonment—must be continued, both for its effect on the consciences of men, and as a temporary preventive. But men cannot be segregated from society indefinitely, until senility has made them fit for freedom. Prisons enough to hold them all could not be built.

The only conceivable alternative is to seek out, while they are in prison, what makes them behave as other men under similar circumstances do not behave; and to correct that crime-productive factor if found.

Psychiatrists and psychologists say that . . . the behavior of human beings is never truly accidental—it follows unalterably the pattern of stimulus and response. It adheres to

than a first offender." THORSTEN SELLIN, THE CRIMINALITY OF YOUTH 102 (1940). Cogent data to the same effect appear in SHELDON & ELEANOR T. GLUECK, ONE THOUSAND JUVENILE DELINQUENTS (1934); JUVENILE DELINQUENTS GROWN UP (1940); CRIMINAL CAREERS (1930); and LATER CRIMINAL CAREERS (1937).

[34] U.S. BUREAU OF PRISONS, DEP'T OF JUSTICE, FEDERAL PRISONS 1956, at 46 (1957).

[35] OGDEN NASH, *Experience to Let*, in I'M A STRANGER HERE MYSELF 51 (1938).

the principle of cause and effect just as certainly as a chemical reaction does. . . . It has been shown that certain recidivist burglars and automobile thieves are as clearly acting out a neurotically motivated pattern of behavior as are arsonists, kleptomaniacs, or sex offenders.[36]

One need take no stock in the theories of psychology. He may adhere obstinately to a belief in free will and may attribute all crime to machinations of the Devil. Yet, he still must concede that in some men is an opening through which the Devil can reach, while unable to reach the will of others in similar conditions. Even the absolute determinist recognizes that the conduct of recidivism must be determined by some recurrent collocation of conditions. And whatever be the psychologic basis of conduct, it is possible to look for the Devil's opening to the free will of the wrongdoer and seek to close it, or to hunt the idiosyncratic factor which otherwise determines a particular individual's conduct and strike to eliminate it. In one such way or the other, repetition can, to some extent, be ended where imprisonment alone would fail.

Can the cause of crime in particular individuals be found and corrected? Until it is seriously tried, there can be no dogmatic answer. As yet, there is not what can be called proof. But isolated experiments, and a variety of specific instances give reason for strong affirmation, especially in the field of physical causation.[37]

Knowledge of much repetitive crime which seemed somehow related to physical defect led Dr. J. F. Pick to the belief that, as he puts it, "A physical handicap in a young person who in other ways finds it a struggle to understand the social scheme of things may prove to be the trigger of a psychosomatic conflict which in one individual may lead to a gastric ulcer and in another to crime." To validate that belief, he put his skill as a plastic surgeon to work in the penitentiary at Joliet, Illinois. He started with six volunteer patients, all of whom had been in repeated trouble with the law and were "problems" even in the institution:

The first was a young man born with ears pinned on his head by nature in what appeared to be an upside down position. The second was an inmate who early in life suffered a gross deformity of the foot with loss of a heel, in consequence of which he limped badly and found it difficult to hold any job. The third was one who seemingly got along well until he lost his nose. The fourth was born with webbed hands and feet. The fifth was covered from head to foot with hundreds of painful tumors of the neurolipoma type. And the sixth, though conscious of a peculiar looking face, claimed he never had any urge to commit crime until his young son, seven years old, began to shy away and remarked, "Daddy, you look just like a bad man. Why don't you change your face?"

All told, Dr. Pick operated, at their request, on 376 penitentiary inmates. Of the results, he says: "The sociological results cannot for the present be stated in full

[36] MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW (1952).

[37] The data and remarks which follow are from unpublished letters to the writer. The necessity and possibility of truly correctional treatment of convicts is discussed in Karpman, *Criminal Psychodynamics*, 47 J. CRIM. L., C. & P.S. 8 (1956); Larson, *On Rehabilitating Chronic Traffic Offenders*, *id.* at 46.

except to say that only 1.07 per cent of the 376 patients operated on have returned to the institution in 10 years. This is markedly below the usual percentage." How many more such men could be similarly taken from the stage army of repeaters, how many future crimes could thus be forestalled no one knows, for the simple reason that we have never tried to find out.

Other opportunities for decimating that stage army of repeaters appear in various ways. Castration as a punishment would be universally condemned; as a punishment, it would serve no purpose except vindictiveness. But as a preventive of repetition by a certain class of dangerous personalities it may have high value. The State Training School of Kansas for half a century has had to deal with men, most of whom are of the feeble-minded type, many guilty of forcible rapes, of attacks on children both heterosexually and homosexually, or otherwise sexually dangerous in society. Its onetime superintendent, Dr. Charles C. Hawke, had opportunity to study the effects of castration in 330 cases. To anyone with only a literary knowledge of eunuchs his incidental conclusions may be startling. The castrate, he found, does not become obese; he does not tend to become hairless; his voice does not change its pitch; he does not become sluggish and lazy, nor morose and vindictive; he does not become sexually incapacitated. But castrates do "lose their excessive sex urge and exhibitionism and are stabilized to the point where they are no longer potential sex criminals." Of one individual, Dr. Hawke says:

> He was recommended for operation in 1931. At that time he was 18 years of age. The Board refused to consent to castration and recommended vasectomy instead. This was done, and one month later he again escaped from the institution and raped a small girl in Wichita. Following this episode, the Board recommended castration, which was done. Following this second operation he gave very little trouble in the institution; was paroled about three years later, and later discharged. In 1941 he married, moved to Wichita where he obtained employment, and has been a law abiding citizen ever since.
>
> We have no records of any sex crimes committed by our castrated parolees.

In most of the United States, castration as a cure, even when voluntarily consented to, is forbidden by law. In Denmark, on the contrary, it is permitted, and from Denmark, Dr. George Sturup reports that only 3.7 per cent of voluntarily-castrated sex criminals repeat their crimes, as compared with 43 per cent of the uncastrated.[38]

Of specific instances, one finds in a medical journal of urology the record of a man four times convicted of rape and assault with intent to rape. When at last properly studied, he was found to be afflicted with chronic inflammation of the urethra which made sexual desire abnormal. The inflammation allayed by medicine, his conduct changed.[39]

Psychiatrist Harold H. Hulbert says of another offender:

[38] Time, April 20, 1953, p. 84, col. 2.

[39] Compare this with a Michigan record: "C.S. after 30 years in prison for four sex offenses, sentenced a fifth time at 59 years of age."

The fellow was irritable, without apparent provocation. He was arrested and fined a few times for assault, then sentenced for attempted murder. In the penitentiary he was so unpredictable in his explosive irritability that he was transferred from security confinement to a prison for insane criminals. There he was treated by "therapeutic neglect" and did not improve. [He had, it later developed, an ulcerated tooth, which he himself pried out with a nail.] . . . . His mouth healed; it was no longer filled with pus. . . . His explosive rages ceased and he slept quietly. He no longer suffered from psychomotor epilepsy; and he ceased to be sullen, dull and touchy. . . . I examined him; the traumatic atrophy of the jaw was apparent. There had been ample cause for his rages, his crimes. [He was released.] For twelve years now he has been a quiet worker. He is steady.—Recovered.

The writer has used these cases only as illustrations; there are, of course, many more. Though by themselves they prove nothing, they suggest a great deal. The treatments necessary to put these possibilities into practice, however, would be expensive. But if by such study and corrective treatment the vast bulk of repeated crime were cut by as little as ten per cent, the profit to society, in money alone, would be enormous. Opportunity for some Foundation or other institution with money to spend in the public interest, therefore, lies here—opportunity for outstandingly beneficial service. Its agents could assemble the discoverable data of what has been accomplished in prevention of repetition. They could analyze the information, draw conclusions as to what can or cannot be done, as to the expectable results of one measure or another. They could learn the facilities which now exist and expound what would be needed. They could prepare legislation not only for declaration of ideals, but for creation of the details as well. And they might sell sound proposals to legislatures for real reduction in repeated crime.

What can be done for less merely physical, more especially psychiatric, causation, no one knows, but there are reasons for optimism. Group therapy, for example—discussion by a group of persons affected by similar psychological troubles, under guidance of a trained psychiatrist—has found enthusiastic advocates for half a century.[40] It has recently found its way into federal prisons and such progressive state institutions as the California Medical Facility—a branch of the prison system. No precise data as to its effectiveness in preventing repetition have yet been collected, but faith in its value is strong among people who have watched its operation.

Simpler, more specifically-applied methods may likewise so alter an individual's psychology as to change him from a poor social risk to a good one. The report on "Number 64758" was an instance. On admission "he was antagonistic, resentful, and walked about with a chip on his shoulder. The general impression was of a man with extremely low intelligence, probably mentally defective." He was, nevertheless, admitted to the prison's school. In fifteen months, he learned what children acquire in four and one-half years of school. "His attitude completely changed; he became cooperative, pleasant and eager to improve himself." As he himself put it:

[40] See MICH. DEP'T OF CORRECTIONS, "LET'S TALK IT OVER," A PROGRAM OF SOCIAL EDUCATION THROUGH GROUP COUNSELLING (1958).

"I won't get into trouble any more because I won't be afraid that people will take advantage of me. I used to feel like a dope, not knowing how to read or write."[41]

Unfortunately, while the physiological cause of idiosyncratic personality is sometimes apparent, the myriad possible factors in a particular individual's psychological condition are usually difficult of ascertainment. As Dr. Guttmacher, chief psychiatrist of the Baltimore Supreme Court, puts it: "Although great progress has been made in the last half century in analyzing and interpreting behavior, the problem is so complex and our skills are still so incomplete that much of the time we have to rely on opinion and conjecture rather than on knowledge." Nevertheless, whatever psychiatry can do should be utilized. Only the most timorous of defeatists would deny the wisdom of setting it to work in the forestalling of repetition.

There is more to the problem, however, than the correction of physical or mental causation. Men in prison today learn from their fellows the practical lore of crime —swindles they had not thought of, new methods of safe-cracking, the arts of evasion. But in the arts and skills of honest living, they get little if any help. Yet, sooner or later, each will be released. Each one will go forth into a society where honest livelihood will be more difficult than before, and his capacity to earn it will be less. The accountant's skill will be rusty from disuse; the artisan unversed in the developments of his trade; the laborer too flabby from idleness for a full day's work. Some few will go forth to ease and financial comfort, but a huge majority will return to greater financial stress than before they were imprisoned and to the same friends who failed before to keep them from crime. It might be said of all these, as a social worker of Cincinnati's House of Correction once put its problem to me: "When prostitutes are sentenced to my institution, we cure them of disease. At the end of their terms we turn them onto the streets, with no money, no job, no home, no place to sleep. Is it strange that they promptly come back?"

The obvious preventative of return for such reasons is two-fold: First, training while in the penitentiary in more effective capacity for earning an honest living. Then, real and affirmative assistance, financial and otherwise, in earning that living and living honestly after release.

Michigan provides a nonsecurity probationary camp to which young probationers can be accredited, as an escape from the normal surroundings which would probably drive them again into crime and where they are given education in industrial skills and book-learning.[42] One California institution, too, exercises its prospective parolees in the muscular development needed for the skills they have learned. There is no sound reason why every penitentiary could not give similar intellectual instruction and training in trade skills to every inmate capable of profiting from it. For many, it might be useless, and for others, only an adjunct of further crime. And,

[41] Communication from Bertram Pollens, Senior Psychologist, N. Y. Dep't of Correction.

[42] See MICH. DEP'T OF CORRECTION PAMPHLET No. 4, PREP: PIONEER READINESS FOR EMPLOYMENT PROGRAM (n.d.); MICH. DEP'T OF CORRECTION PAMPHLET No. 6, CAMP PUGSLEY (n.d.). These pamphlets and others carry the legend "printed by Hill Top Trade School," a state corrective institution.

again, it might be expensive, though not necessarily so.[43] But the reduction in recidivism would more than pay those costs.

After release, if a man is to abstain from further crime, he almost invariably requires assistance—not merely the negative help of being required to keep away from saloons and to report to a supervisor periodically. He comes out of prison usually with no money at his command. If he is to earn his way successfully, someone must initially furnish enough to pay the initiation fees without which some unions will not permit him to work at his trade. Someone must furnish him with the tools a skilled mechanic may need. Though he be no more than an unskilled laborer, someone must furnish him transportation to wherever work is to be found. And someone must provide the cost of mere existence until pay day arrives.[44]

Without such affirmative assistance, the ex-convict is normally doomed to return to prison. The assistance necessary to save him from recidivism, however, like everything else in crime prevention, will require state money. But the total amount conceivably called for would be far less than the cost of his repeated criminality—cost to his victim, cost to the state for arrest, prosecution, and further prison maintenance. Any proper "legal approach" to crime prevention is inescapably bound to establish such positive methods of preventing repetition.

But success in any of these aims will not be attained by the cheap and easy procedure of putting orders on the statute books. Declared law is not active law. Too often, indeed, it begets inaction. It creates a consoling delusion that what ought to be done has been done, and the originally impelling concern becomes quiescent.

The Youth Correction Authority Act proposed by the American Law Institute is an outstanding illustration of such unsatisfied hope.[45] Its first provision reads: "The purpose of this Act is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of violation of law." It sets up, verbally, an "Authority" empowered and directed to provide for convicts and to do for them everything suggested in the foregoing paragraphs. Its ideas and general provisions were adopted by the legislatures of five states and by Congress.[46] Unfortunately,

[43] There would be ample market for goods produced by prisoners being trained in trade skills. Statutes in many states do prohibit the sale or other disposition of prison-made goods on the open market. But some of these statutes expressly provide that state institutions shall, so far as possible, buy what they need from prison-operated industries, and others impliedly permit it. Such statutes are noted specifically in JOHN B. WAITE, THE PREVENTION OF REPEATED CRIME 62 (1943).

[44] "Only a thorough sociological and clinical study of the individual repeater can guide us in our selection of rehabilitative measures. This paper attempts to treat the decisive importance of one segment of correctional work: the reintegration of convicted men and women into society by means of proper employment." Frym, *The Treatment of Recidivists*, 47 J. CRIM. L., C. & P.S. 1 (1956). What little is now being done is discussed in JOHN B. WAITE, THE PREVENTION OF REPEATED CRIME (1943).

[45] As the writer was one of its original proponents and its chief draftsman, whatever criticism he voices falls directly upon himself.

[46] CAL. WELFARE AND INST'NS CODE § 1710; MASS. ANN. LAWS cc. 119, 120 (1951); MINN. STAT. §§ 242.02 *et seq.* (1957 Supp.); TEX. REV. CIV. STAT. art. 5143c (1957 Supp.); WIS. STAT. c. 54 (1955); 64 STAT. 1085 (1950), 18 U.S.C. §§ 5001 *et seq.* (1952). See BERTRAM M. BECK, A STUDY OF THE YOUTH

however, and perhaps naïvely, while it created an Authority directed and empowered to do these things, it did not specify within itself the facilities and funds necessary for carrying its purposes into action. It could be enacted, and was enacted, as a declaration of purpose, without making accomplishment of that purpose possible. And because the enacting legislatures failed to implement their stated objectives with necessary money and facilities, the whole idea remains, for the most part, just that—a good idea.

That is only an example on a large scale. State statutes are filled with other laudable directives of narrower scope which cannot be carried out because legislatures, satisfied with saying the right thing, furnish no facilities for effectuating what they say. A Michigan statute, for example, provides that boys or girls between the ages of seventeen and nineteen who are found to be addicted to drugs or liquor, who associate with prostitutes, pimps, or other disreputable persons, who are wilfully disobedient, or who "habitually idle away their time" may be committed to the State Corrections Commission for "correctional treatment and care" until the age of twenty-one years; but they "shall be confined and cared for separate and apart from persons committed by courts of criminal jurisdiction."[47] A laudable purpose, to prevent further and more serious wrongdoing. An excellent *statute*! Except that it provides no places in which the Commission can confine these young people and no facilities whatever for the "treatment" ordered.

As this was being written, Michigan newspapers reported:[48]

> A group of 22 youthful offenders from Detroit, refused admittance to the Lansing Boys Vocational School, were back at their homes today—authorities hoped. Wayne County yesterday sent a busload of 25 youths sentenced to the school at Lansing. The school found room for three of them, but the remainder were returned to Detroit. The school now has an enrollment of 421 boys against an ideal capacity of 365 and has another 63 on a waiting list.

Careless enactments such as these, good law which speaks well but cannot act by itself, are commonplace in every state.

Law-making is easy. But its objectives take understanding, money, and energy. The conclusion is clear—the wise legal approach to crime and correction, for legislatures and judges alike, is to stop making new law and begin giving effect to existing law.

AUTHORITY PROGRAM (1951). See also Tappan, *Young Adults Under the Youth Authority*, 47 J. CRIM. L., C. & P.S. 629 (1957).

[47] MICH. COMP. LAWS §§ 712A.2, 712A.5 (1948).

[48] Ann Arbor (Mich.) News, April 10, 1958. A 1958 legislative change in the name from "Ionia Reformatory" to "Hilltop Academy and Trade School" will have no effect on its capacity; it is but another illustration of satisfying, but unsatisfactory, law-making.

A CRITIQUE OF THE LEGAL APPROACH TO CRIME AND CORRECTION

ANDREW S. WATSON*

Definition of crime and theories of correction need to be considered together. In relation to the policy goals of the criminal law, the "why" of the crime must be related to its definition, and it cannot be separated from the corrective process without abandoning all psychological rationality. All too often, it would appear that in practice, these two elements in the process of criminal law and administration are widely separated, are implemented by different groups of people, largely without each other's interest or participation.

I

INTRODUCTION

Though primitive societies seem not to have utilized physical punishments extensively,[1] in the earliest days of codified criminal law, the process of defining crime was directed toward isolating individuals whose behavior was regarded as unacceptable or dangerous and insuring that they would be severely punished, which was felt to be the way to safeguard society. This involved moral judgments about goodness and badness, and badness deserved the community's punishment.

The relationship of the crime to the punishment was always clear, and since crime aroused anxiousness as well as anger, criminals were severely punished in a mood of open and violent retribution. Many primitive legal codes followed the *lex talionis,* and cruel and mutilating punishments, usually ending in death, were regarded as well-deserved by wrongdoers.[2] Such punishment came to be regarded as the only way in which the group could be protected from the onslaughts of its offenders. There was little emotional conflict about inflicting such punishment, since the danger of the prohibited behavior was regarded as sufficient to justify fully unmitigated, retaliative reaction.

Various philosophers have postulated that this early relinquishment of personal retaliation to the social institution of the law was a mutual agreement whereby all parties agreed to suppress their own retaliative impulses in exchange for similar

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[1] See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 256-59 (5th ed. 1955).

[2] See JOHN BIGGS, JR., THE GUILTY MIND 12-15 (1955); Wolfgang, *Political Crimes and Punishments in Renaissance Florence,* 44 J. CRIM. L., C. & P.S. 555 (1954); H. OPPENHEIMER, THE RATIONALE OF PUNISHMENT 103-37 (1913).

suppression on the part of others, turning the function of punishment over to the sovereign.[3] Such a hypothesis makes sound psychological sense, and child psychiatrists studying the early control mechanisms of young children make it clear that the child relinquishes his hostile, attacking impulses in order to secure, friendly, loving treatment at the hands of his immediate family and society. He makes a bargain to control his aggressive and destructive impulses in order to avoid similar counter-impulses from others and retain love and acceptability. If he breaks his "agreement," his expectation is that he shall be punished severely; and, indeed, the fantasies of most children in this regard are little different from the real penalties doled out to early criminals in the form of cruel, degrading mutilations and death.[4]

It is just in the nature of this universal childhood expectation that we may understand something of the difficulty which besets efforts to make more rational, criminal codes and corrective institutions. Though historically we have moved well away from the period in which violent reprisal was the penalty for lawbreaking, every adult is not more than a few decades removed from the period of his individual life when retributive punishment was expected for all breaches of conduct.

Understanding the means by which a child learns to harness his own aggressive impulses will shed some light on the dynamics of retribution. It will also illustrate some of the forces which make it progressively more difficult, in the face of our evolution toward an ethical concept of relationships, to deal out violent punishments or to execute criminals. The tendency toward nullification has become extremely important in the trial of capital cases, and the mere process of selecting a jury which at least consciously will consider giving the death penalty may exhaust many jury panels before twelve such persons can be found. Even then, it is far from clear that they will deal with the case with any degree of rationality.[5]

A child begins its painful and oft-times frightening efforts at controlling aggressive and murderous impulses by disowning them and burying them deeply away from self-awareness. The impulses are hidden so thoroughly beneath the surface of his consciousness that, in fact, he does not "know" he has them, and strong opposite feelings may be put in their place. He will feel that to kill is Evil, and since the mere thought of killing arouses such internal anxiety, he will become Good. These repressive mechanisms are essential socially in the development of children, and those who do not develop them become delinquents, recognized or unrecognized. Young children need such mechanisms to control their impulse-life, and respectable society reinforces such attitudes at every opportunity. (If the theory of deterrence has any psychological validity, it is most likely to apply to the very

[3] CESARE BONESANA BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 11 (3d ed. 1770); OPPENHEIMER, *op. cit. supra* note 2, at 50-58.

[4] Early conscience formation, at its base, is related to the child's fear of physical harm from being abandoned to his helplessness or of direct physical injury in retaliation for his own assaultive wishes. These internalized fantasies may become completely divorced from social reality. For a psychoanalytic description of this process, see OTTO FENICHEL, THE PSYCHOANALYTIC THEORY OF NEUROSES 105-10 (1945).

[5] See Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 443 (1957).

young. Though they are largely oblivious to the happenings in the criminal courts, they are extremely sensitive to what happens to the transgressor in their immediate environment, and in this way, they are deterred.) This method of literally blocking out all awareness of disapproval of aggressive desire, then, is the first means by which everyone learns to control impulses, and historically it would appear to be the first stage in the development of a social ethic as well as a criminal law. Thus, we find in the early books of the Old Testament that God's vengeance upon sinners is likely to destroy them completely. A forbidden glance at sinning could turn Lot's wife into a pillar of salt.[6] This punishing attitude in the setting of the Old Testament is to be found in most primitive legal codes.

With growth and development in a healthy child, new methods of control become available which make it possible for him to weigh the pros and cons of aggressiveness, and on the basis of ethical rationalism, impulses may be more consciously controlled or redirected. With the child's growing capacity to master his impulses and his body, he also is able to realize consciously the existence of powerful inner drives to kill, hurt, steal, or indulge in sexual behavior. He may do this without being overwhelmed by anxiousness, stirred by the apprehension that these impulses will break out into the open and provoke serious punishment by the people around him.[7] In other words, he is able to consider his behavior and make judgments about the appropriateness of various possible actions. It is only at this point, when increased awareness of inner impulses occurs, that the individual truly may be said to have any degree of "free choice" or "free will." Behavior governed by the more primitive conscience of the child can hardly be called free will, since actions are not considered, but rejected automatically, without any conscious judgment whatsoever.

With greater control, sensitivity to inner drives becomes possible once again. It is essential that the growing child be given opportunities to deal consciously with them, in the open, to gain skill in reality-oriented expression. If he is not permitted and assisted in this process, he feels limited, criticized, and too severely punished, for "just being human." Punishment will be considered as unjust, and he will feel that the group around him is not fair. This, in turn, increases his tendency to rebel against the "system," or to withdraw, which may ultimately result in a disastrous outburst of inner passions, overthrowing tenuous controls in some sort of "impulse" crime. At this stage of development, the picture of others being punished for their impulses has no demonstrated value. Making an example of others is more likely to arouse an inner sense of injustice than to afford righteous relief.[8]

Parents with their children systematically practice incapacitation as a technique for molding behavior. When a child is deemed too young to understand a situation or to cope with it, he is removed from the difficult circumstances. Mature parents incapacitate the child only until he can learn to cope with the situation by himself.

[6] GENESIS 19:26.

[7] An excellent discussion of the child's psychosocial development may be found in ERIK ERIKSON, CHILDHOOD AND SOCIETY (1950).

[8] See FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 3-11, 39-40 (rev. ed. 1956).

The moment he is capable of learning, he is permitted to tackle it.[9] Such experiences repeated, again and again, ultimately produce competence, freedom, and independence, and the child will become a truly free adult in his community. When there has been failure to resolve successfully some social problem, good parents step into the situation and invoke the process of rehabilitation. This is educative in nature and is directed toward helping the child achieve more appropriate and, therefore, efficient means of coping with his problems.[10] Here, too, the corrective process is applied only so long as it is necessary. It is accomplished in a positive atmosphere and without retributive intention. It should be noted, however, that all education of children is carried out in an atmosphere of prohibition and inhibition. To be educated into a civilization requires the inhibition of impulses and the control of those impulses or, at the very least, their redirection into channels which are acceptable socially. Such an inhibiting process itself produces anger and rebelliousness, which adds to the burden of control by the child. Thus, the process of education or rehabilitation itself may provoke some form of angry aggressiveness.[11]

Perhaps by now, the reader is wondering what these remarks have to do with the legal approach to crime and correction. A second thought, however, should reveal that the definition of crime (the value judgment of behavior which is forbidden and punishable) and the means by which this inappropriate behavior is altered, is closely related to the psychological process present in every individual. A standard of justice is developed by everyone, and the desire to know the outcome of one's behavior in terms of its acceptability or punishment is universal. It is no wonder that the illusion of the "known certainty of the law" is so desirable. Each individual's conscience is a lawyer of a sort and attempts to define a criminal code in order to anticipate and avoid punishment. Each individual, if reasonably mature, is constantly attempting to remodel his own penal code to arrive at a more precise and equitable form of justice in order that he may enjoy greater psychic freedom. Each is willing to submit to external codes only if they are felt to be equitable and relate justly to him. While the desire for predictability and uniformity of application is great, even greater is the desire to know that the system will be just, in the sense that it will take cognizance of his needs and capabilities as an individual.

II

THE CORRECTIVE PROCESS

We have noted how justice relates to the child's early growth and development. While initially this necessitates a more or less rigid code which "answers" all problems, the maturing capacity to comprehend social relationships creates the

[9] See Whitehorn, *Stress and Emotional Health*, 112 AM. J. PSYCHIATRY 781 (1956).

[10] For a discussion of both success and failure in this process, see LEON J. SAUL, THE HOSTILE MIND 163-80 (1956).

[11] An excellent discussion of this subject by Anna Freud, renowned authority on child education and child psychotherapy, may be found in *Psychoanalysis and the Training of the Young Child*, 4 PSYCHOANALYTIC Q. 15 (1935).

realization that justice cannot be so rigidly defined. The new need arises at this point, and willingness to accept the system is partially related to whether or not justice is tempered with understanding and sympathy.[12] Social and ethical development along these lines is responsible for the progressive tempering of justice and for the progressive relinquishment of retribution, with an increased interest in rehabilitative techniques. This reflects the increased capacity to cope consciously with angry, retributive impulses, instead of pretending that they do not exist, as well as a greater ability to understand these impulses in others. One may not understand and effectively deal with the antisociality in others until these impulses are acceptable to oneself. We can clearly see the evolution of this concept in the Judeo-Christian religious tradition, as well as in the other ethical religions.[13] The development of the legal concepts of responsibility also reveal progressive dissatisfaction with punishment which is divorced from consideration of an individual's total capacity to control himself. It is possible, also, that greatly increased police efficiency has reduced the intensity of fear, anger, and retributive wishes felt by the average citizen. Each individual criminal caught by the police does not stand for hundreds of uncaught criminals in the mind of the law-abiding. The cry for greater severity always goes up when it appears that police efficiency is disintegrating.

Most modern writers, discussing the policy goals of criminal law, tend to deny the current importance of retribution. It is summarily dismissed as being no longer an appropriate goal for the law, and, ipso facto, it no longer exists. A cursory examination of a few criminal trial records makes it all too clear, however, that, even if not widely acknowledged, it is still a potent factor in the process of criminal adjudication. Those judges whose public statements leave little doubt of their retributive intentions toward certain types of offenders are by no means exceptional in relation to ultimate results.[14]

Modern psychiatric theory can illuminate and perhaps lend some assistance in dealing with this ubiquitous impulse. Perhaps the mere fact that there is such a vociferous denial of retribution in criminal law is, itself, a symptom of the stage of development in which man and society find themselves. The psychoanalyst takes it for granted that all individuals biologically must respond to any threat with the impulse either to fight back, or to run away from the source of the threat. This we

[12] "Let us consult the human heart, and there we shall find the foundation of the sovereign's right to punish; for no advantage in moral policy can be lasting which is not founded on the indelible sentiments of the heart of man. Whatever law deviates from this principle will always meet with a resistance which will destroy it in the end; for the smallest force continually applied will overcome the most violent motion communicated to bodies." BECCARIA, *op. cit. supra* note 3, at 8. See also I J. S. MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 292-93 (1865).

[13] *E.g., compare* "And the man that committith adultery with another man's wife, even he that committith adultery with his neighbor's wife, the adulterer and the adultress shall surely be put to death," LEVITICUS 20:10, *with* "He that is without sin among you, let him first cast a stone at her." JOHN 7:7.

[14] See GREGORY ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 69-88 (1954); HENRY WEIHOFEN, THE URGE TO PUNISH 130-70 (1956); JEROME FRANK, LAW AND THE MODERN MIND 100-17 (1936); JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES OF THE COMMITTEE ON PUNISHMENT FOR CRIME, REPORT 23-30 (1942).

view as a primitive physiological reaction which is impossible to eradicate. The most any person may hope to accomplish is to learn how to cope with this powerful reaction in ways which are socially efficient.

It should be clear that the most efficient means involve some conscious handling of this reaction. The child's method of denying hostile reactions provides him with a modicum of control, at the cost of losing close and precise contact with the realities in a situation. The criminal process, if it is to deal effectively with the hostile retributive impulse, should make full use of our knowledge and do what is possible to help the participants in the process deal consciously with it. It is quite obvious that during many criminal trials, counsel for each side, consciously or unconsciously, attempts to impinge upon this impulse in whichever way will favor his side of the case. The prosecutor will attempt to arouse the retributive impulse, while defense counsel will try to arouse sympathy and even guilt about this impulse. Accepting the presence of such tendencies raises several questions about the kind of argument permissible, if the true objective is to arrive at a just and rational finding.

The recent popular television and movie story, *Twelve Angry Men,* is a brilliant description of the manner in which this retributive impulse impinged upon several members of the jury in a murder trial. The way in which these jurors gained insight into their emotional reactions and altered their judgments was clearly brought out and, in fact, illustrates possible techniques whereby the effect of the universally-present retributive impulse might be diminished.

We should point out that the effect of this retributive impulse may be eliminated from legal decisions only to the extent which the general understanding and ethical standard of the community will tolerate. As Holmes stated:[15]

> The first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it, and we should naturally expect that the most important purposes of punishment would be co-extensive with the whole field of its application.

We should recall, again, that the ethical attitudes of the public toward its criminals is a function of the society's maturation.[16] As its level of ethical morality increases (and police action becomes more efficient), it has less need to be retributive and more opportunity to "love" those who offend it. Such attitudes have long been expressed in the ethical religions of Christianity, Mohammedanism, and Buddhism.

[15] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 41-42 (1949).

[16] Beccaria said: "I conclude with this reflection, that the severity of punishments ought to be in proportion to the state of the nation. Among a people hardly yet emerged from barbarity, they should be most severe, as strong impressions are required; but in proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended that the necessary relation between the object and the sensation should be maintained." BECCARIA, *op. cit. supra* note 3, at 178.

Such an attitude of love does not mean approval of the antisocial behavior, but rather involves understanding of causes and a sincere wish to bring all men into acceptability. This is much the same relationship as loving parents have with their children. It involves imposing necessary limits and controls on the child's behavior when he has reached his own limits and is not able to provide them for himself. In this way, skill in self-control is increased. Admittedly, this is a delicate line to follow. Psychiatric evidence is clear, however, that only through such understanding is unacceptable behavior changed to effective behavior.[17] Such treatment is not "soft" in the sense that it permits the individual to "get away with" his inappropriate or offensive behavior. Indeed, he is called to task for it and penalized in some fashion. Any punishment used, however, always serves the process of changing behavior; and mere physical punishment will usually bring no such change, but will arouse rather further hostile and aggressive desires to thwart the punishing authority.[18]

It is interesting to recall that occasionally societies have evolved means of criminal treatment which utilize completely the tort concept of repayment for ill done, rather than punitive action in a retributive manner. This was apparently true under Cossack law.[19]

> Under this legal code, all actions were considered claims for damages by one party from another. No action could be taken against an individual in the interests of society as a whole, but only on the charge of specific injury to person or property, brought by the victim. Such charges did not distinguish between civil and criminal offenses. All injuries from murder to the misuse of borrowed property might be compensated for according to an elaborate tariff of fines, damages and reparations. . . .

The mere pressure of social disapproval seemed sufficient to bring offenders to settle their obligations. These practices were apparently introduced through Moslem influence on Turkish and Mongol codes, in which the Mohammedan prohibition against killing other "believers" was expressly forbidden. It would appear that in this cultural setting, such a system of justice worked very efficiently. Such techniques are currently feared because of the feeling that many potential criminals feel more free to take their chances with the risks involved in this form of punishment.[20] While this is logical, it does not relate to the basic forces which shape most social conforming, the internal images of what is good and what is bad behavior.[21]

We mentioned earlier, while discussing the dynamics of conscience-formation,

[17] Erich Fromm develops this thesis is an interesting work which attempts a synthesis of psychoanalytic theory, religion, and philosophy. See ERICH FROMM, THE ART OF LOVING 107-33 (1956); see also THEODOR REIK, MYTH AND GUILT 428-29 (1957); LAWRENCE S. KUBIE, PRACTICAL AND THEORETICAL ASPECTS OF PYCHOANALYSIS 156-57 (1950).

[18] For a case study of such a person, see ROBERT LINDNER, REBEL WITHOUT A CAUSE (1944).

[19] ALFRED E. HUDSON, KAZAK SOCIAL STRUCTURE 67-69 (Yale University Publications in Anthropology No. 20, 1938).

[20] See RAYMOND SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 21-34 (1911), reprinted in ALBERT J. HARNO, CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE 1 (2d ed. 1939).

[21] See Modlin, *The Position of the Psychiatrist in the Administration of the Criminal Law*, 4 KAN. L. REV. 353 (1956).

that the very act of inflicting injury on another brings an individual into conflict with himself.[22] This being true, it poses the ultimate social necessity of abandoning any type of retributive punishment in order to reinforce the progressive tendency toward rehabilitation. Such trends are reflected by the law in such examples as the eighth amendment of the Constitution, which specifically prohibits cruel and inhuman punishments, and in the increasing tendency to abandon the death sentence. It may be stated flatly that punishments designed to hurt do just exactly that and nothing more. They do not help to bring the wrong-doer into a constructive relationship with society. Simply speaking, they do not work, have never worked, and only serve to brutalize the society that enforces them.

The law must deal with the universal presence of retributive impulses. Rather than building into the law mechanisms which facilitate denying their existence, efforts should be made to force this impulse to the surface, so that individuals involved in the legal process as either judges, jurors, or advocates will have the maximum potential opportunity for avoiding their reactions to this impulse.

In considering the policy of incapacitation, we should recognize clearly that its moral basis and its psychological efficiency are limited only to those situations where an individual's capacity to conform to social demands is absent or distorted. Any deviation from this policy will be publicly perceived as running counter to the common sense of justice. The law will appear as a punishing, tyrannical parent who lashes out blindly and with violence, and may be feared and hated, but not respected or trusted.

It is a common complaint by prison inmates that it is impossible for them to learn how to live "outside" from their experience "inside the walls." A walk through any prison corridor should confirm this statement for nearly anyone. The atmosphere in the average penal institution is electrified with hostile tensions which can surely bring good to no one, and it would appear very difficult, indeed, to justify such incapacitation in the name of social rehabilitation. There is a vast literature in the field of penology to demonstrate the inadequacy and the folly of such punitive treatment, and a glance at recidivism rates will certainly demolish any theory that this form of treatment assists criminals in becoming better adjusted to the society in which they earlier failed.

Recent efforts to modify corrective institutions toward truly rehabilitative goals show a promise which, in the long run, not only will salvage many potentially good citizens, but will alleviate the increasing financial problem of maintaining and building prisons. Incapacitation, if utilized for therapeutic goals, can lead to rehabilitation, and so reduce the amount of incapacitation necessary for social safety.

The most widely-accepted goal of the criminal law is that of deterrence, and this is the basis for most current theory in criminal law.[23] One may question the

[22] See ALEXANDER & STAUB, *op. cit. supra* note 8, at 18; Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 192 (1958); see also Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952).

[23] "Of all these purposes, that of deterrence is more or less the official one. It is the one readiest at

moral validity of the idea of deterrence, since this philosophy deliberately utilizes the offender as if he were a thing, to be used as an "example" for the theoretical benefit of society. This view has recently been elucidated further by Professor Caleb Foote in a work written for the United Nations.[24] This paper will, however, explore only the practicability of the idea.

According to this principle,[25]

> if a person has engaged in behavior of a sort which is undesirable and can be deterred, and if he is subjected to treatment which is generally regarded as unpleasant, other persons may be deterred from engaging in similar conduct by the fear that if they do so they will be similarly treated.

It is interesting to note that this definition has the conditional statement: behavior which "can be deterred." The psychiatrist would certainly concur with this view that some crimes *cannot* be deterred and that most crimes of "violence" and "passion" are in this category. For example, a large percentage of homicides are committed by persons with a close emotional relationship to the one they kill, and the homicide usually occurs in the throes of a sudden and powerful outburst of aggressive rage.[26] Though there is insufficient evidence from which to draw final conclusions, none of the studies of the motivational patterns of such murderers gives any indication that deterrence possibly could affect them.[27] At the moment the homicide is committed, the law and the consequences for breaking it are remote from conscious consideration. It is only after the pressure of the passion is past that such abstract matters may come into awareness. All too frequently, these individuals are not devoid of conscience, but rather have a conscience which is dedicated to denying the existence of the murderous forces which it must control. Such a conscience, we have already said, is always potentially dangerous and sets the stage for possible complete loss of control. It is an all-or-nothing conscience.

We remarked earlier that the time at which deterrence is most likely to be effective is with children of a very tender age. Early behavior conformity is related, at least to some degree, to the principle of deterrence. A child follows the expected pattern in order to avoid the pain of punishment. By the age of six or seven, how-

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hand. It seems to afford the amplest and fullest justification for any act of punishment or of removal, and it makes at present an immediate and general appeal. If we consider it a moment, we shall see that its implied background is one with which our training has made us familiar in youth. We have all been members of groups in school and elsewhere in which it was far more important that certain acts should be prevented from happening than that the doers of these acts should be removed or punished. Deterrence is the chief instrumentality of what we call discipline." Radin, *Enemies of Society*, 27 J. CRIM. L. & CRIMINOLOGY 328, 333 (1936).

[24] Foote, *Problems in the Protection of Human Rights in Criminal Law and Procedure*, in UNITED NATIONS SEMINAR ON THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL LAW AND PROCEDURE working paper E (1958).

[25] JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 11 (1940).

[26] See MARVIN WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 203-221 (1958).

[27] See LINDESAY NEUSTATTER, THE MIND OF THE MURDERER (1957). This volume has the descriptions of many different types of personalities who committed murders, but does not reach far toward their motivational patterns. See also DUNCAN ET AL., PSYCHOGENETIC DETERMINANTS IN MURDER: STUDY OF SIX PRISONERS CONVICTED OF FIRST-DEGREE MURDER AND THEIR PARENTS (to be published).

ever, he is beginning to learn mainly through the positive desire to be like those whom he admires and loves. If the model's behavior is socially appropriate and ethical, the child will learn to behave likewise and will have a sense of unworthiness when he fails. Psychiatrists regard this kind of emulative learning as the most powerful force in creating adults who will have the capacity to perceive social values and to behave in a socially-constructive manner, rather than destructively. Individuals reaching maturity without the capacity for social conformity are not influenced readily by the example of others. Dession has said,[28]

> . . . I suppose that it is evident that the deterrent effect of any particular sentence imposed must depend on two things: the way in which the convict sentenced is capable and has been conditioned to respond to such a prescription; and the way in which others of comparable personality and similar inclination in the general population are capable and have been conditioned to respond to the example of the sentence inflicted on the convict. If deterrence is to work the latter must presumably identify with the convict, must be averse to suffering a similar sentence themselves, and must be made aware that there is a high probability of the latter eventuality.
>
> For these reasons it seems to me that we must rule out as promising subjects for the deterrence approach those who will consider any expected sentence a martyrdom preferable to conformity with the law (the political fanatic who identifies with an alien hostile culture, the religious fanatic, the patriot who engages in espionage on behalf of his own country abroad), those in whom the conscious awareness involved in the process of being deterred will not be controlling (the mental defective in a complicated situation, the psychotic in many situations, the intoxicated or drug-influenced, the extremely neurotic offender who "does not know why he did it" in the sense that he was driven by subconscious or not altogether conscious impulsions, and the "temporarily insane" offender who happened to be confronted by a situation with which he could not otherwise emotionally cope), and those who will not identify with the convict and hence not take him as an example (members of elite groups in the community who may consider themselves, rightly or wrongly, as exempt from the law or regulation in question, persons who feel that in any event they have adequate protection, and persons who feel that they are sufficiently smarter than the convict to avoid getting caught).

The kind of people who *are* deterrable by example are intelligent, mature, well-informed, well-controlled, and under no extraordinary pressures. Such persons commonly find their own conscience and the good opinion of their friends quite adequate deterrents. It is not the kind of punishment that deters the normal man, but his conviction that he will probably be caught and will lose the approval of society and the fact that he will lose his own self-respect whether caught or not. The more violence involved in the crime, the less deterrable by means of example it is likely to be. In less violent crimes, it is the loss of approval which is the effective agent, not the unpleasantness following the loss.

It would seem, therefore, that punishment which involves incapacitation can serve fruitful purposes only in so far as it leads to rehabilitation of the individual himself. If it serves no deterrent function to others, then its degree should be

[28] Dession, *Justice after Conviction*, 25 CONN. B. J. 215, 223-24 (1951).

limited by the rehabilitative needs of the individual—*i.e.*, he should be incapacitated only so long as needed to prevent future criminal behavior or so long as needed to alter his behavior in order to avoid subsequent criminality; to incapacitate a person longer than this runs counter to a sense of justice.

We should raise a note of caution in regard to incapacitation for rehabilitative purposes in the light of our limited knowledge in precisely predicting therapeutic results and future behavior. The possible duration of such incapacitation should be related to the severity of the potential risk. In other words, minor offenders, though they commit crimes which arouse some negative reaction in the community, could not justifiably be held for indeterminate periods, with only the vague possibility of rehabilitative change. Therefore, the standard for the duration of any rehabilitative sentence must include a consideration of how dangerous or annoying the person would be, *if* he did not change at all. Only substantial danger should justify continued forced rehabilitation.[29]

Many authors have written about the problems arising when the goals of deterrence and rehabilitation conflict in the corrective process.[30] Considerations of deterrence very often block potential rehabilitation. (It is nearly impossible to conduct any kind of rehabilitative process in an institution dedicated to retributive punishment. When the institution is heading in one direction, while the therapists are attempting another, the result will be an impasse.) Incapacitation should be a function either of the individual's capacity to be rehabilitated, or of continued social risk.[31] Any compromise which impinges on the rehabilitative potential or social necessity should be dropped because of its demonstrated inefficiency.

Many policies set forth in the name of deterrence appear to be social rationalizations in the service of retributive impulses. For example, it is often stated that our knowledge of criminal behavior is so uncertain that it would be socially dangerous to try out the suggested changes in correction practice. This statement does not begin to reflect our current experience. There is ample evidence that retributive and deterrent techniques make little impact on many classes of criminals; in fact, they appear to strengthen criminality.[32] Since these methods do not work, it is logical to begin some form of alteration upon them. Society is not protected by the perpetuation of ineffective techniques and is increasingly endangered by them. To experiment widely with rehabilitative techniques could hardly produce social loss or increase social risk, since such experiments would be coupled with some form of incapacitation.

There is social gain in dedicating ourselves to some rehabilitation process, even though practically it is not yet possible to treat actively all those whom we presently are incapacitating. Merely changing the names and the treatment policies of our

[29] See Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950); Tappan, *Sentences for Sex Criminals*, 42 *id.* at 332 (1952).

[30] See Frym, *Past and Future of Criminal Rehabilitation*, 3 J. PUB. L. 453 (1955).

[31] An excellent analysis of the problem is Waelder, *supra* note 22.

[32] See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 590 (5th ed. 1955).

institutions would have a salutary effect, however, and would open the way to future change.

It may be argued that since the rehabilitative process has been tried without remarkable success in the case of the juvenile offender, there is little reason to attempt it with adult criminals. There can be little doubt that our treatment of juveniles has not approached the desired results. It is also clear, however, that there has been very little creative effort to approach the core of the difficulty—the offender's emotional and personality structure. Since it is difficult to imagine devising any more retributive methods of punishment than have been used through the years, we may safely assume that such a treatment has little chance for success. In the light of minimal rehabilitative efforts ordinarily made with juveniles, therefore, it cannot be contended that this method has been disproven.

If the progression from retributive to rehabilitative forms of correction is desirable and to be anticipated as a matter of evolution, what are the forces which block such progress? Do these barriers offer any possibility for conscious alteration, and is there anything which those interested in the administration of criminal law can do to accelerate change? If we accept even tentatively the points enumerated above, several things emerge which might be done to assist this change.

We have seen that every person in growing from childhood to his adult role in society must pass through the same form of maturational progression that society, as a whole, has experienced. We have stated that within each person resides powerful, retributive impulses, and that maturing increases the capacity to handle impulses according to rational rather than irrational methods. We saw that one of the common ways in which retribution is handled by children is through covering it over with a sort of moralistic, inverting maneuver, so that attack can be unleashed against social offenders in the name of righteousness, with pious horror.[33] An increase of self-awareness in every individual, and most especially in those who are to become involved with the process of criminal law, is essential to understanding and dealing with this primitive impulse.

This raises a question about the nature of legal education. Courses of criminal law deal mainly with substantive issues, and the corrective process, with its sociological and psychological implications, is largely left out of consideration. An examination of most of the currently-used casebooks in criminal law underscores this situation. Only two of the entire group have any substantial amount of material drawn from the behavioral sciences.[34] These tend to deal with statistical implications, rather than to elucidate motivational forces which must be considered to arrive at any rational method of correction.

[33] Many crusading types of persons utilize this kind of impulse control. An example of such a person was Anthony Comstock, in his drive to institute federal control of obscenity in the mails. See Paul & Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. PA. L. REV. 217 (1957).

[34] GEORGE H. DESSION, CRIMINAL LAW ADMINISTRATION AND PUBLIC ORDER (1948); JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION (1940).

III

THE DEFINITION OF CRIMES

There is a great opportunity to utilize psychiatric and other behavioral science data in the process of defining criminal acts, and one place where this is being done very effectively is in the formulation of the Model Penal Code by the American Law Institute. In their comments on the various articles of the code, the reporters have amassed an impressive amount of relevant behavioral science material, and its impact on the code formulations is conspicuous. Many psychologically meaningless legal distinctions, generally present in criminal laws, have been eliminated, and on sound scientific grounds. For example, the research of Kinsey has apparently lent considerable support to the abolition of several classes of sex crimes which public attitudes have tended to nullify.[35]

The praiseworthy goals of the ALI in its code can be best stated in the Reporter's own words:[36]

> Paragraph (2) defines the major purposes of the provisions dealing with the sentencing and treatment of offenders and the goals to be pursued in their administration. The section is drafted in the view that sentencing and treatment policy should serve the end of crime prevention. It does not undertake, however, to state a fixed priority among the means to such prevention, i.e., the deterrence of potential criminals and the incapacitation and correction of the individual offender. These are all proper goals to be pursued in social action with respect to the offender, one or another of which may call for the larger emphasis in a particular context or situation. What the Code seeks is the just harmonizing of these subordinate objectives, rather than the concentration on some single target of this kind. It is also recognized that not even crime prevention can be said to be the only end involved. The correction and rehabilitation of offenders is a social value in itself, as well as a preventive instrument. Basic considerations of justice demand, moreover, that penal law safeguard offenders against excessive, disproportionate or arbitrary punishment, that it afford fair warning of the nature of the sentences that may be imposed upon conviction and that differences among offenders be reflected in the just individualization of their treatment. Finally, it is among the basic purposes of the draft to define, coordinate and harmonize the powers, duties and functions of the courts and of correctional administration, to advance the use of generally accepted scientific method and knowledge in the sentencing and treatment of offenders and to integrate responsibility for the administration of the state correctional system in a unified state agency.
>
> The sentencing and treatment plan proposed has been designed to further and, so far as possible, to harmonize these goals.

A factor which tends to mitigate rational elaboration of the corrective process is the universal desire for certainty. Lawyers have always attempted to formulate laws which are clear, concise, and free of ambiguity. One may readily sympathize with this goal, since each of us has a powerful psychological desire to order the world around us, master it, and be able to predict the results of various kinds of behavior. Lawyers and judges are not the sole aspirants for "known certainty."

[35] MODEL PENAL CODE § 207 (Tent. Draft. No. 4, 1955).
[36] *Id.* at 4-5 (Tent. Draft No. 2, 1954).

This desire for unambiguousness and clarity, however, may lead to great uncertainty. There are many facets of human behavior which are so complex as to defy simple definition, and it is self-defeating to narrow definitions to such a degree that they preclude consideration of much of that which is defined. For example, we may grow restless with the "uncertainty" of an insanity test such as *Durham*,[37] which does not lay out narrow and precise meanings of its terms.[38] But when we attempt to regulate and define responsibility in the language of *M'Naghten's Case*,[39] we leave out a very large segment of the important information regarding social responsibility. We are not just interested in whether a person "knows" what he is doing and what it means; we are primarily intersted in his ability to conform his behavior to the demands of society. This broad and open-ended question is explored under such a rule as *Durham*, and no later alterations in medical nomenclature or psychiatric theory can make nonsense of it. Under *M'Naghten*, however, it is extremely difficult to pursue this question, and the results may end as little short of ridiculous.

It is assumed often at various points in the legal procedure that the clear statement of a verbal formula will communicate complex highly technical ideas. Certainly, modern psychiatric and communication theory underscore the fallacy of this assumption.[40] To communicate psychological material effectively, it is essential that there be extensive discussion, with clarification and reclarification of terms. It is inappropriate to attempt to bring technical information to a jury through precise formulae, when such formulae have such small likelihood of communicating. Recognition of this fact might eliminate much of the controversy over the use of specific words and enhance the likelihood for more full explanations, as in the charge to the jury. Needless to say, many judges are well aware of this and make no such facile assumptions.

Among its several purposes, the criminal law attempts to define that group of acts which, if committed under certain circumstances, will result in the isolation and treatment of the offenders. The ultimate purpose of this process is to protect society against such persons according to the means which it considers best at any given point in time. While the criminal law serves to set forth a standard of unacceptable behavior, this would not carry it beyond the purpose of a code of ethics or a religious code if it did not invoke also some corrective process. We have alluded to the fact that in the earliest criminal codes, proof of commission of the forbidden act caused the individual to be held liable, and he was summarily punished.

After many centuries of development, there came into the English common law the concept of the *mens rea*.[41] This part of the definition of the crime seems to

[37] Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954).

[38] See Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761 (1956).

[39] 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

[40] See Probert, *Law, Logic and Communication*, 9 WESTERN RES. L. REV. 129 (1958); Hayakawa, *Semantics, Law, and Priestly-Minded Men, id.* at 176.

[41] See Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); see also Lévitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922).

have developed partially, at least, out of the growing sense of injustice when either the very young or the mentally-disturbed were punished.[42] It did not feel just to punish an individual who did not seem to have the means at his command to avoid the forbidden act. It was felt appropriate to punish only when "free will" existed.

The concepts of free will and of *mens rea* lead us to a consideration of a part of the mental apparatus which dynamic psychiatrists call the ego. The ego is that part of the personality which is involved with testing, defining, estimating, judging, remembering, perceiving, synthesizing, and integrating the various aspects of the world of reality.[43] The main advances in psychiatry during the past fifty years have centered around the elucidation of these functions and a greater understanding of the way they impinge upon the instinctual forces of the body. Such investigations have gone far to demonstrate the accuracy of the philosophical speculations of Bentham, Mill, and others.[44] Since it is the ego's function to control behavior, it is only through understanding these functions in any given individual that his *mens rea* can be understood. This, in turn, will answer the question of what correctional approach can be used best to bring him back to a safe relationship with society.

The concept of free will emanates largely from theological thinking, which held that an individual was born with free will and kept it, except when possessed by devils, which itself was an act of will.[45] The modern dynamic psychiatrist, however, would view this concept of freedom as putting the cart before the horse. Studies of children, as well as of adult mentally-ill patients, emphasize the fact that free will or freedom of the choice in action is something which is developed slowly and progressively from childhood to adulthood. It cannot exist in those situations where the individual, out of psychic necessity, must be unaware of part of his feelings, attitudes, and impulses. True freedom involves choice, and choice is a conscious process. Unconscious forces from within, which dictate behavior without the person being able to alter it, is the hallmark of all neurosis and mental illness, as well as the significant factor for measuring mental health and maturity. In other words, free will is the achievement of maturity.

The capacity to relate accurately to the world of reality and to make free choices is missing in three significant groups of people. First, are children. The law has long realized that children should not be held responsible for their acts, for the self-evident reason that they have not the experience or judgment to make appropriate choices. One of the early examples of a changing sense of justice was the exclusion of individuals of tender years from the sanctions of the criminal law.

The next group which lacks the capacity to make free choices in relation to reality are those whom we designate as "mentally-ill." This concept has been greatly broadened in recent years, as more and more has been learned about psychological

[42] See Sayre, *supra* note 41, at 985.
[43] See FRANZ ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS 82-104 (1948).
[44] See, *e.g.*, I THE WORKS OF JEREMY BENTHAM 1 (Tait ed. 1843).
[45] See GREGORY ZILBOORG, A HISTORY OF MEDICAL PSYCHOLOGY 154-63 (1941).

function. Originally, only those designated as psychotic and those so severely neurotic as to have substantially lost the capacity to live realistically were viewed as mentally-ill by lawyers and doctors alike. In recent years, however, the group now called "character neuroses" (which includes those formerly called psychopaths), is also regarded as mentally-ill, since they are just as devoid of free choice as the groups mentioned before, at least in so far as certain kinds of behavior are concerned. While we may not approve of their behavior, there is no significant distinction in their capacity to control and manipulate their own acts, and in this respect, they are no different from children or the frankly psychotic individuals. Retributive reactions to them are, in a very real sense, unjust, since they have no more freedom to alter their behavior than children and psychotic adults. While they must be controlled and incapacitated legally, they need help just as deeply as do the other two groups mentioned, and we know that their behavior will not be altered by retributive or deterrent punishment.[46]

The third group lacking the capacity to manipulate reality includes those who come from cultural settings with limited knowledge about nature and the sciences, at least in the terms in which we conceptualize it. For example, an individual reared in a relatively primitive culture, transplanted into an urban community, will have little understanding of the complex society he perceives about him. He brings into the strange, new environment all of his previous concepts about the nature of the world, such as a belief in the magic of Voodoo. In order to cope with the stress of his new surroundings, he may, without hesitation, put his magic into action, including the procurement of someone's skull.[47] Few would have a sense of justice if such a person were punished retributively, since he clearly does not understand the nature of the prohibitions which he has broken. Some form of incapacitating and rehabilitative restriction for such individuals is necessary, and that approach in the long run would work social change most rapidly.

There are certain areas of law which, in terms of their current definition, raise difficulty for the psychiatrist. For example, many cases involving "mistake," "provocation," and "insanity" all look suspiciously similar in regard to the mental state in the defendant. Many persons who commit offenses which involve these questions have some sort of defective judgment capacity which leads them to make mistakes, be provoked, and act on some internal stimulus rather than in response to the external world. Since these are differences in the degree of defectiveness, the definition of the crime should relate always to the offender's specific mental state. Culpability would fall in a spectrum ranging from complete responsibility, through not guilty by reason of insanity, to not guilty. The points on this scale would be defined in terms of the offenders psychological capacity to control and conform his behavior to legal

[46] For contrasting opinions on this subject, *compare* Bromberg, *The Treatability of the Psychopath*, 110 AM. J. PSYCHIATRY 604 (1954), *with* Kaplan, *Barriers to the Establishment of a Deterministic Criminal Law*, 46 KY. L. J. 103 (1957).

[47] The recent New Jersey case of Juan Rivera Aponte illustrates this situation fully. See The Sunday Bulletin (Philadelphia, Pa.), July 14, 1957, p. 46.

standards. During the trial, it would be determined if the accused did or did not commit the act he is charged with, and where on the culpability spectrum his mental state would place him. For example, in cases of homicide, once the fact of the killing is settled, evidence would be presented on the mental state, including such factors as misperceptions ("mistake"). These would be tied to psychiatric testimony demonstrating the presence or absence of mental traits making such misperceptions possible. In some cases, such evidence would lead to complete exculpation, and in others, the jury could find not guilty by reason of insanity, depending on where along the spectrum they decided the evidence fell.

The evidence utilized in this process also would indicate clearly what form of sentence should be imposed.[48] This is similar to the concept of "diminished responsibility" and brings together more clearly the significant elements in the definition of the crime.

One of the eternal problems relating to the process of definition occurs when the definition itself is elevated to the status of a social institution which is sacrosanct and may not be altered.[49] This is a universal psychological tendency, present in much of the recent discussion regarding the rule of *M'Naghten*. Many courts elaborate at some length the virtue of changing to a *Durham*-like rule, only to conclude by saying that it is not their prerogative to make such a change, that it must come from the legislature. This seems to be rationalization, since in most jurisdictions the law of responsibility is judicial in origin and not legislative. The rule has become an institution, and there is a sense of anxiety about altering it.[50] In order to maintain the feeling that law is just, it is essential that it remain in close contact with the advance of scientific knowledge. When the educated population is more aware of psychological issues than the law, it is detrimental to the social acceptability of the law. The *parens patriae* is regarded as being mean and tyrannical, and this legitimizes rebelliousness against it.

Needless to say, in the process of defining crimes or anything else, knowledge is essential to working out an accurate definition. Arguments about the number of angels who may stand on the head of a pin are as old as mankind, and are always

[48] In California, the trial is divided into two stages when the question of mental state is at issue. In the first stage, the question of whether or not defendant committed the act of which he is charged is settled; and in the second, the issue of sanity is adjudicated. CAL. PEN. CODE § 1026.

[49] ALLEN WHEELIS, THE QUEST FOR IDENTITY 180-98 (1958).

[50] Similar anxiety arose over the adoption of *M'Naghten*. Dr. Bernard Diamond has found an interesting, polemical poem entitled Monomania, written by "Wetnurse" and published in 1843 in London, a few months after the *M'Naghten* trial. This poem puts forth the identical arguments for *not* adopting *M'Naghten* as have appeared 110 years later in regard to *Durham*. For example:

> "Devils, or Dunces, it is all the same—
> They work for evil, though by different means;
> The real distinction is but in the name,
> As those must know who've been behind the scenes;
> Though one sometimes pursues the higher game.
> Dunces kill subjects—devils aim at Queens;
> And so they will, till by experience taught,
> That they'll be hanged, as soon as they are caught."

unanswerable. So long as psychological and emotional matters are largely not understood by the practitioners of the law, we cannot expect that the law will reflect appropriately most of the knowledge in this area. It is often said that psychiatry is not yet advanced sufficiently to warrant its use by the law. The same argument was made against *M'Naghten*.[51] In most jurisdictions, acceptance and understanding of this medical issue has not yet reached the level of Isaac Ray's understanding, let alone that of current concepts. Therefore, it would seem imperative that some means of learning about this subject be provided to the practitioners of law. Psychiatric concepts, though difficult, have more substance than angels, and with proper educative means, most may be advanced in their understanding of this material. This is the only field of medicine about which the more ignorant a man is, the more sure a sense of expertness he has in evaluating the phenomena. Some jurisdictions have even written this into the law, making it clear that lay interpretation of psychological behavior is every bit as valid as that of psychiatric experts.[52] This attitude is by no means rare, although irrational.

The significant question raised by this symposium is how we may achieve the goal of integrating scientific knowledge with legal principles in the definition of crime and in criminal correction. While it is quite clear that in practice, these two functions may be separated sharply, it is all too apparent that this is an inefficient course to follow. Always remembering that "for the most part, the purpose of the criminal law is only to induce external conformity to rule,"[53] in the definition of crimes, it is essential that we pay attention to all of the psychological factors which lead to their commission. These are the significant elements which must be dealt with, both as a protective measure and in the corrective process. For example, the so-called "subjective test" is the only psychologically sound one for determining culpability in those cases where "reasonableness" is an issue. Some jurisdictions, seeking objectivity where none may be had, continue their search for the ever-elusive "reasonable man." While guilt should be tied to the subjective standard, often corrective measures ought to be applied to those found not guilty, since their acts have given manifest evidence of their defective judgment capacity. At the risk of repetition, correction for these persons always should be rehabilitation and/or incapacitation.

This same matter has come to the attention of insurance vendors in the syndrome called "accident proneness." Here, though the individual is guilty of no intentional act, the frequent automobile accidents in which he is involved have made it clear to these vendors that such persons have certain mental characteristics which lead them more frequently into accidents than their fellow drivers. After this attribute has been adequately demonstrated, the vendors take action in their own interest and subsequently refuse to sell insurance to such persons. When such tendencies are manifest in automobile driving, which has such a high potential danger, society

[51] See Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 AM J. PSYCHIATRY 651-56 (1956).
[52] See, *e.g.*, Commonwealth v. Patskin, 372 Pa. 402, 93 A.2d 704 (1953).
[53] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 49 (1940).

well might consider forcing these individuals into some corrective situation in order to protect itself against the high risk they provide. In such a situation, the definition of the "crime" *must* approach the tenuous, psychological issues which lead to the (negligent) acts and which *should* be considered in any corrective measures taken to prevent such risks.

IV

SUGGESTIONS

We have already mentioned the current status of most teaching in the field of criminal law and noted the scarcity or utter lack of materials relating to the dynamics of the corrective process, as well as the dynamics of criminal motivation. In the handling of the substantive law, under considerations of state of mind (a critical part in the definition of many crimes), discussions center largely around legal precedents and legal definitions of these states of mind. These rarely reach the level of psychological reality necessary to work out a rational classification system in terms of social risk. In the name of reason, there is strong justification for incorporating some materials on motivational forces into the education of the law student. Whether or not this should be a part of prelegal education or of the law school curriculum is too complex to be discussed here.[54] At any rate, it would seem that this kind of understanding is essential to those who define laws, administer them, and carry out the corrective process.

While there is a scarcity of appropriate teaching materials, there are presently several attempts under way to rectify this situation.[55] Many laws schools have initiated courses involving law with psychology, psychiatry, and other social sciences; but for the most part, these have been elective seminars, with only slight impact on the student body as a whole. Until relevant materials are brought into the teaching of criminal law, lack of understanding will persist and we can anticipate that current anomalies in regard to crime and correction will also persist.[56]

We are told that, for the present, the law must be content to protect society through current means, since to do otherwise would be intolerably dangerous. Is it contended that rehabilitating criminals is against the public interest? It is true that a rehabilitative program extensive enough to deal with all the current apprehended criimnals is, indeed, an expensive proposition. Not to embark upon such a program is more expensive, however, not to mention the far greater social cost and disability.

[54] See Watson, *The Law and Behavioral Science Project at the University of Pennsylvania: A Psychiatrist on the Law Faculty*, 11 J. LEGAL ED. 73 (1958).

[55] See Watson, *supra* note 54; Foote, *The Law and Behavioral Science Project at the University of Pennsylvania: Family and Criminal Law*, *id.* at 80; Levin, *The Law and Behavioral Science Project at the University of Pennsylvania: Evidence*, *id.* at 87. Yale Law School also is embarked on a program similar to that of the University of Pennsylvania, under the sponsorship of the National Institute of Mental Health, to develop such materials.

[56] Dr. John M. MacDonald, of Colorado Psychopathic Hospital, in a paper to be published in a forthcoming issue of the *Journal of Criminal Law, Criminology, and Police Science*, states that 32 law schools give lectures on psychiatry or psychology and that the number is increasing.

Merely to state an intention to treat rather than punish could bring about some useful changes. Confinement in a hospital-type setting is not an eagerly sought-after experience, but the atmosphere of acceptance of the individual's problems is far healthier than the atmosphere of hate, fear, and rage that exists in the usual penal institution. In a hospital setting, there is always the stimulus to attempt treatment, and it is in just such settings that treatment techniques will ultimately develop. It will take a long time to train individuals to perform rehabilitative functions on such a large scale, but we may be positive that until suitable institutions exist, qualified individuals will not apply themselves to such training.

It is just not true that we have no knowledge of how to treat the criminal members of our society. All criminal behavior can be understood; almost all criminal individuals can be handled therapeutically with less risk than our current techniques afford; many criminals can be rehabilitated by therapeutic intervention. Purely rehabilitative goals have been set for a few penal institutions. One such notable institution is the Medical Facility of California, located in the picturesque Sacramento Valley, near Vacaville. This institution was built and designed purely for the purposes of rehabilitative treatment for its criminal population. All personnel, from the superintendent to the custodian, are oriented to a treatment process. One of the striking things about this institution, which, on preliminary evaluation, appears to be doing a highly significant and successful therapeutic job with its population, is that its work is carried out mainly by relatively inexperienced personnel, whose principal initial qualifications appeared to be dedication. Most of those performing psychotherapy had no special psychiatric training, but, in fact, have developed their skill while working in group-therapy projects with the prisoners. They have applied psychiatric understanding, coupled with basic interest in treatment, and this has created a hopeful atmosphere which pervades the entire institution. Even the custodians share in the therapeutic enthusiasm, and their relationship to the inmates is manifestly positive. The total operation is dedicated to therapy. There is no prison production, and all activities are educational and therapeutic by design. Such an environment is very different from the tense hostility so familiar to most penal institutions.[57]

Another institution doing significant pioneering work is the New Jersey Diagnostic Center, in Menlo Park. Here, too, a similar therapeutic orientation is present, and significant success has been recorded.[58]

It is in corrective institutions such as these, aided and supported by the judiciary, that we may hope to resolve the problem of crime. There, the principal issue is not what crime has been committed, but rather what the motives of the crime were and what the man needs to help him bring his behavior back into conformity with society.[59]

[57] See Showstack, *Preliminary Report on the Psychiatric Treatment of Prisoners at the California Medical Facility*, 112 AM. J. PSYCHIATRY 821 (1956).

[58] See Frym, *supra* note 30, at 454-55.

[59] See Satten, *The Concept of Responsibility in Psychiatry and Its Relationship to the Legal Problem of Criminal Responsibility*, 4 KAN. L. REV. 363 (1956).

We can state flatly that mere alteration of words in the definitions of crimes will effect no positive changes. Individuals reading books on the subject of mental activity or corrective methods will gain little in their capacity to deal with problems. Learning the nature of the corrective process must also be an emotional experience. How many individuals practicing criminal law understand much of what takes place in a prison? A recent project, carried out by law students of the University of Pennsylvania, permitted the students to work for three weeks as prison custodians in the New York City penal system.[60] These students have a much better grasp of the nature of the corrective process as it is carried out in prisons than they would have through any amount of classroom discussion or reading. Such experience might well be a part of all law students' exposure to criminal law.

Likewise, there is a common feeling that when a person is sent to a mental hospital, he is let off too easily and thus will not gain understanding into the nature of his criminal acts. Again, this is the assumption of persons who have never had extended contact with a mental hospital. A chance to spend a few days in such an institution would greatly broaden the understanding and insight of law students, lawyers, and judges on the nature of the problems involved in this form of correction. They would bring to the law a better understanding of the issues involved on matters concerning mental illness and its treatment.

One concept which needs much attention is the significance that criminal behavior has for the individuals who practice it. As we have noted earlier, to practice crime and to live the kind of antisocial life which criminals generally exhibit is, in itself, a means of psychological adjustment. Such persons practice criminality in order to balance out their needs, since they have no other means available. Merely criticizing the nature of this adjustment will do nothing but strengthen their dedication to it. These individuals already believe that they are not understood or accepted by society and that they have no stake in its dictates and goals. Moralizing only supports their conviction.

Recently, there has been a great hue and cry about the serious problem of juvenile delinquency and juvenile gangs. While the seriousness of this situation cannot be challenged, most of the comments about it show gross misunderstanding of the nature of this activity. All authorities studying the problem sociologically or psychologically concur that gang activity, or its more socially-acceptable form of group or club activity, is a necessary phase of adolescent development.[61] The fact is that groups of adolescents in socially-depressed areas form gangs which attack the culture around them. Groups of adolescents everywhere form gangs, but only a few are antisocial in their activities. Understanding this fact could lead judicial and administrative authorities to attempt to find appropriate ways for this group activity to be expressed.[62]

[60] See Roberts, Palermo, Foote, *et al.*, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 685 (1958).

[61] See Erikson, *The Problem of Ego Identity*, 4 J. AM. PSYCHOANALYTIC ASS'N 56 (1956).

[62] For a constructive concept, see JOSEPH LOHMAN, JUVENILE DELINQUENCY (1957).

Recently, in Philadelphia, a large organization known as the Cadet Corps was organized in a Negro section of the community.[63] This group had excellent internal discipline and was apparently directed toward socially-useful goals. Considerable anxiety was aroused among officials when it was discovered, and there seemed to be a fear that some form of fascism was about to spring forth from this organization. While adolescent group activity is a fertile field for the exploitation of political goals, there was no evidence that this organization had any such direction. This group met a powerful social need for a critical age group and might well have provided the basis for study of the means by which adolescent groups could be directed toward socially-appropriate goals. The reaction of authorities was directed primarily toward destroying this group, however, throwing its members back on the streets to find other outlets for their group interests, and overlooking an excellent opportunity for social, psychological, and criminological research.

Today, imagination and adventure is called for, not the reinstitution of the whipping post and other punitive measures. Such correctional measures have proven their inadequacy, and the only basis for supporting them is the indulgence of frightened, anxious, and retributive impulses.[64]

V

CONCLUSION

We can say that while psychiatry and the behavioral sciences cannot provide all the answers to legal questions, there is good reason to believe that a mutual exploration of many pressing legal problems would lead to fruitful results. This is not an easy task, but the knowledge of the behavioral sciences today is sufficiently useful, sufficiently well-established, and widely enough understood that to fail to incorporate it will let the social procession get well out of sight of the law.[65]

This writer is very sensitive to the enormous problems involved in codifying a criminal law and the difficulties of administering equitably a system of correction. Further, he has been impressed with the intellectual power and rare courage displayed by the legal profession in wrestling with these problems that go so deep and touch so many primitive fears and awesome taboos. A statement by Sir James Stephen would seem to summarize the appropriate relationship between law and psychiatry very aptly:[66]

> I think that in dealing with matters so obscure and difficult, the two great professions of law and medicine ought rather to feel for each other's difficulties than to speak harshly of each other's shortcomings.

[63] The Philadelphia Inquirer, July 18, 1956, p. 25.

[64] See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 265-66 (5th ed. 1955).

[65] Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, reprinted in 8 BAYLOR L. REV. 1, 2 (1956): "Law must be stable but it cannot stand still."

[66] 2 JAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 128 (1883).

THE PSYCHIATRIC APPROACH TO CRIME AND CORRECTION

MANFRED S. GUTTMACHER*

I

The psychiatrist has a peculiarly tolerant atttitude toward criminal behavior, which is born out of his recognition of the welter of antisocial impulses occurring in noncriminal individuals. This has been known to wise men throughout the ages. Goethe said, "There is no crime of which I do not deem myself capable."[1]

The psychoanalytic studies of normal individuals have revealed a quantum of aggression and hostility in everyone. Indeed, most persons have sadistic fantasies and murderous dreams. The fascination that newspaper accounts of crime, crime novels, and crime dramas have, for vast numbers of people, is surely dependent, in large measure, upon the ubiquity of antisocial impulses. The ease with which peaceable men can be transformed into relentless warriors is further evidence of this. People do not stop to consider the fact that evolution is a painfully slow process and that the child born in the modern aseptic delivery room is as savagely amoral as that produced by our neolithic progenitors. Indeed, socialization is, in many respects, as marvelous a phenomenon as physical growth itself.

The psychiatrist realizes that a psychological differentiation between the neurotic criminal, who heedlessly and persistently risks his freedom to acquire money illicitly, and the miser, who legitimately amasses a fortune and has a monument erected to his memory, may be a very fine one. The pedophile and the revered leader of the boys' club may be close relatives, indeed. The findings of Professor Kinsey's researches, showing the prevalence of deviant and legally-prohibited sexual behavior among all groups of the population,[2] were largely anticipated by psychiatrists. And Sutherland's studies of white-collar crime[3] and surveys like that of Wallerstein and Wyle[4] demonstrate the high incidence of lawlessness that occurs among individuals never convicted of crime and the general acceptance of such practices by large numbers of people.

Prior to the advent of modern dynamic psychiatry, great stress was laid upon heredity. Vague concepts like neuropathic tainting were given prominence. During the early decades of this century, sterilization laws for the mentally defective and certain groups of the insane, as well as for certain classes of criminals, chiefly major

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[1] See THEODOR REIK, THE UNKNOWN MURDERER 45 (Jones transl. 1945).

[2] ALFRED C. KINSEY, WARDWELL B. POMEROY, AND CLYDE E. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

[3] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949).

[4] Wallerstein & Wyle, *Our Law-Abiding Law-Breakers*, 25 PROBATION 107 (1947).

recidivists and sex offenders, were passed in many states.[5] With the development of modern psychiatry, however, the pessimistic fatalism toward insanity resulting from the emphasis on the constitution gave way to an overzealous optimism in regard to the treatment of mental disorders. With it, there has developed an almost total disregard of heredity, since it does not lend itself to therapeutic efforts. Investigations making use of the twin method, by the psychiatrists Johannes Lange on crime,[6] Rosanoff on juvenile delinquency,[7] and Franz Kallmann on mental disorder and homosexuality,[8] have not received the attention among behavioral scientists that they merit. Freud himself did not belittle the role of heredity. He often spoke of the important, though unfathomable role of the constitution in all types of mental disorder. But his method of intensive exploration of the individual, which has held the center of the stage in recent decades, is not suitable for studying the role of heredity.

These matters lead us to consideration of determinism versus free will and to that of criminal responsibility. It is in this area that psychiatrists generally differ most profoundly from members of the legal and correctional disciplines. Some psychiatrists applaud the pronouncement of Ernest Jones, who said, "By accepting the legal view of free will they [doctors] abandon the only fundamental canon of all science."[9] Certainly, everyone who has worked in psychiatry must have been impressed with the vastly unequal opportunities afforded individuals to develop healthy egos. Furthermore, the degree of mental health that the individual possesses bears a direct relationship to the freedom of choice which he is able to exercise. A daily awareness of these facts gives psychiatrists an unusual tolerance for the vagaries of human behavior, whether it be criminal or noncriminal. In psychiatry, one's orientations must, in large measure, be deterministic.

It is surely scientifically unsound to hold that men must be divided into two distinct categories, the responsible and the irresponsible. There must be degrees of responsibility. Yet, as residents of the world of reality, we have to admit that the vast majority of men must be held responsible for their behavior. Even if certain philosophers conclude that man has no freedom of choice, such a construct must be established for practical living, just as the concept that all men are created equal must become an axiom of democratic societies. Apparently in testing the limits to which Freud would go in upholding determinism, he was asked whether a man should be held responsible for his dreams. The master retorted that if the dreamer was not responsible for his dreams, who should be.[10]

[5] *Cf., e.g.*, Buck v. Bell, 274 U.S. 200 (1927); Skinner v. Oklahoma, 316 U.S. 535 (1942).

[6] JOHANNES LANGE, CRIME AND DESTINY (1930).

[7] A. J. Rosanoff, L. M. Handy, & I. A. Rosanoff, *Criminality and Delinquency in Twins*, 24 J. CRIM. L. & CRIMINOLOGY 923 (1934).

[8] Kallmann, *Genetics of Psychoses: An Analysis of 1,232 Twin Index Families*, 2 AM. J. HUMAN GENETICS 385 (1950), *Twin and Sibship Study of Overt Male Homosexuality*, 4 *id.* at 136 (1952).

[9] Quoted in Szass, *Some Observations on the Relationship between Psychiatry and Law*, 175 ARCHIVES NEUROLOGY AND PSYCHIATRY 299 (1956).

[10] Unpublished lecture of Dr. Gregory Zilboorg.

Nevertheless, in certain psychiatric groups, it has become a sign of modernity and scientific maturity to go all out for determinism, to believe that man is a helpless victim of his genes and his environment. To subscribe to this is a symbol that one is not dragging one's scientific heels. The more sage leaders of American psychiatry, however, have accepted the fact that man is not without freedom of choice. Professor John Whitehorn, a leading eclectic psychiatrist, wrote in 1953:[11]

> So far as I can see, there exists a range of freedom of choice between different possibilities in conduct or behavior. The range of freedom of choice appears to me to be much narrower than is implied in most of the exhortations to reform by "will-power," and the range of freedom of choice is particularly restricted in the condition that we characterize professionally as illness, but seldom if ever is the range of freedom reduced to zero, as is implied in a strictly deterministic view.

And Franz Alexander, who has been in the forefront of the psychoanalysts who have studied criminal behavior, recently said of the doctrine of strict determinism:[12]

> The basic error in this whole reasoning is that it treats the conscious and unconscious portions of the personality as two completely isolated systems without any intercommunication, like the left hand is not knowing what the right hand is doing. This assumption is contrary to our knowledge. Slips of the tongue and other parapraxias are committed via our voluntary muscles, yet under the influence of unconscious motives. In such cases behavior is influenced by fully or partially unconscious motivations which infiltrate by various psychodynamic processes into territory otherwise under the control of the conscious ego. The intercommunication between the two systems, conscious and unconscious, however, is a two way traffic. Not only do unconscious processes influence conscious processes, but also conversely conscious processes influence the unconscious. . . . Punishment of careless drivers, even if their accidents are the result of unconscious motives, will increase almost every driver's sense of responsibility and consequently his vigilance over his movements. To eliminate punishment for accidents from traffic laws would undoubtedly result in an increase in accidents.

Although the whole range of behavior falls within the interest of psychiatry, its particular concern is with that behavior which results from mental disorder. There has been no psychiatric study which gives us a true measure of the incidence of psychiatric morbidity in the criminal population. There have, however, been statistical surveys which bear on this point. Dr. Winfred Overholser, while Commissioner of Mental Hygiene in Massachusetts, recorded the findings in the examinations carried out under the Briggs Law over a fourteen-year period, which showed that fifteen per cent of those examined were psychiatrically deviated to a significant extent.[13] Bromberg and Thompson analyzed the findings in ten thousand consecutive cases examined in the Psychiatric Clinic of the Court of General Sessions in New York, and they reported significant psychiatric defects in twenty-two per cent of

[11] John Whitehorn, in *Psychiatry and the Law*, 1953 PROCEEDINGS OF THE AMERICAN PSYCHOPATHOLOGICAL ASSOCIATION 153 (1955).

[12] FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 129 (rev. ed. 1956).

[13] Overholser, *The Briggs Law of Massachusetts*, 25 J. CRIM. L. & CRIMINOLOGY 859 (1935).

these defendants.[14] Both studies found 1.5 per cent to be psychotic. But in the material for both studies, factors of selection were operative.

It is interesting that three psychiatrists, with extensive experience in criminal psychiatry and with different scientific orientations, entirely independent of one another, have expressed an identical opinion as to the incidence of psychiatric abnormality in the criminal population. The late Sir Norwood East, the very conservative leader of criminal psychiatry in England,[15] Dr. Gregory Zilboorg,[16] a leading psychoanalyst in this country, and the writer of this paper have all indicated that in their opinions, about eighty per cent of criminals are psychiatrically normal.

It is noteworthy that Franz Alexander and Hugo Staub in the first edition of their valuable book, *The Criminal, the Judge and the Public,* stated that the number of "normal criminals," the dysocial individuals who have identified with criminal superegos, was small.[17] They were then writing on the basis of their European experience. In the recent new edition, however, after Dr. Alexander had been exposed to American culture for a quarter of a century—and surely it cannot be gainsaid that Chicago was the ideal place for such exposure—he expresses a different opinion: "The prevalence of the latter [normal criminal] group in the United States is beyond question."[18]

Some psychiatrists are loath to accept the view that a large proportion of criminals are not psychiatrically abnormal, particularly the recidivists. When one argues the point, they say, "But surely, nearly all murderers must be sick individuals." It seems to the writer that in dealing with these questions, consideration should be given to statistics on the racial incidence of crime. For example, in 1957, the homicide rate for negroes compared to whites in Baltimore was eleven times their incidence in the population.[19] I know of no study, however, indicating a greatly higher psychiatric morbidity rate for negroes than for whites.

II

Both the treatment and the prevention of disease progresses haltingly until its pathology is established. In most instances, the great strides must wait upon the discovery of aetiology. As far as crime is concerned, whether it be normal criminality, which is essentially a social disease, or crime dependent on mental morbidity, its pathology is poorly understood and its aetiology is essentially unknown. We find ourselves in a position similar to that of the systematists of the eighteenth century; we must be satisfied largely with description and classification.

One of the greatest difficulties in psychiatry is its esoteric vocabulary. Its special

[14] Bromberg & Thompson, *Relation of Psychosis, Mental Defect and Personality to Crime,* 28 *id.* at 70 (1937).

[15] NORWOOD EAST (ED.), THE ROOTS OF CRIME 44 (1954).

[16] GREGORY ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 43 (1954).

[17] FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 209 (1931).

[18] FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 11 (rev. ed. 1956).

[19] DEPARTMENT OF POST MORTEM EXAMINERS OF MARYLAND, 18TH ANN. REP. 30 (1957).

terminology not only makes communications with other disciplines difficult, but its technical terms have varying connotations and, in some instances, even varying denotations for psychiatrists. In the writer's efforts to understand the criminals that he examines, he has grouped them under several categories. But no classification which he has come upon seems adequate. At present, he would suggest the following:

1. The normal criminal, the dysocial group made up of individuals who have identified with the asocial elements in our society, generally with morally and socially defective parental figures. They compose seventy-five to eighty per cent of criminals.

2. The accidental or occasional criminal, the individual with an essentially healthy superego who has become overwhelmed by a special set of circumstances. This is a very small group. On the basis of claims made by offenders and their families, this group would appear to be much larger than it actually is. Nearly every mother whose youthful son becomes involved in criminal behavior asserts that he is a good boy, but the momentary victim of bad associates. On investigation, one generally learns that he had for years been a serious school behavior problem and a well-known client of the juvenile court. The bank officials whom the writer has met in prison all had pretty shady reputations before their convictions.

3. The organically or constitutionally predisposed criminal, forming a disparate group which constitutes a small portion of the total number of criminals and is comprised of numerous subgroups: the intellectually defective, the postencephalitic, the epileptic, the senile deteriorative, the posttraumatic, etc. Of course, the vast majority of persons with these maladies are noncriminal.

The role of head injury in the genesis of antisocial behavior is unclear. The high incidence of head injury in the criminal population is probably related to their general heedlessness resulting in their being accident-prone, rather than being an important causative factor in their delinquency. Why individuals, presumably exposed to identical injurious agents develop varying resultant behavioral patterns is uncertain. The effect is probably dependent on the basic structure of the premorbid personality to a greater degree than on the exact nature and location of the injury.

4. The psychopathic or sociopathic criminal, the individual who is not psychotic (insane), but who indulges in irrational, antisocial behavior, probably resulting from hidden unconscious neurotic conflicts which constitute the driving dynamic force underlying his criminal conduct. This is a complex group, comprising ten to fifteen per cent of criminals. Among them are to be found some of the most malignant and recidivistic offenders. For purposes of exposition, it is desirable to attempt to isolate discrete subgroups based primarily on behavioral manifestations. Until there is a deeper understanding of the psychopathology and some knowledge of aetiological factors, no really satisfactory subclassification of this important criminal group can be devised.

There is the sociopathic type, described so fully in Hervey Cleckley's *Mask of*

Sanity.[20] They have shown evidences of life-long social maladjustment reaching back into early childhood. Dr. Robert Lindner used the very apt phrase, "rebel without cause," to describe them.[21] They are in conflict with society in all areas. Benjamin Rush, the first psychiatrist in America and one of the signers of the Declaration of Independence, called the condition "anomia," a term derived from the Greek word for lawlessness.[22] He postulated the existence of a congenital defect of the moral sense in conjunction with normal, or even superior, intellectual powers. English writers have designated these individuals "moral imbeciles" or "moral defectives."[23]

They are often very bright, attractive, and superficially ingratiating. But this amiability is a skillful masking of an overwhelming hostility. They are socially irresponsible. Other persons are merely objects to be manipulated for their own hedonistic purposes. Distant goals are sacrificed for immediate expediency. It has been suggested that they possess a peculiar incapacity to conceptualize, particularly in regard to time. They possess no loyalties and are suspicious of others. Indeed, this incapacity for establishing satisfying and meaningful relationships with other individuals is their nuclear defect. This makes psychiatric treatment so difficult, for psychotherapy—to be effective—requires that the patient establish a significant degree of identification with the therapist.

There is no agreement as to the causative factors involved in the development of such a crippling personality deformity. The most plausible hypothesis is that these individuals were deprived of deep and nurturing parental affection during their earliest years of life and that, as children, they instinctively developed, as a defense against this deprivation, an aggressive, insensitive relationship toward other individuals. This lack of early love objects with whom strong identification could be established became the crucial defect in their personality development. Bender maintains that a very critical break in total family identification during the second, third and fourth years may produce the same personality distortion.[24] The same hypothesis has been advanced to account for the development of certain schizophrenic disorders. Indeed, the two conditions have marked similarities.

Sociopaths seemingly do not learn by experience, since despite admonitions and punishments, they continue their same pattern of objectionable conduct. This is one of the characteristics that suggests that their disorder is essentially neurotic, since the repetitive element is constantly present in disturbances that are neurotic in origin. Many of the check forgers, swindlers, and confidence men are recruited from their ranks. Dr. Cleckley maintains that these individuals are no better able to conform

[20] HERVEY CLECKLEY, THE MASK OF SANITY (3d ed. 1955).

[21] See ROBERT M. LINDNER, REBEL WITHOUT A CAUSE (1944).

[22] See J. C. BUCKNILL & D. H. TUKE, A MANUAL OF PSYCHOLOGICAL MEDICINE (1858).

[23] See J. C. PRITCHARD, TREATISE ON INSANITY (1835); Curran, *A Psychiatric Approach to the Offender*, in EAST (ED.), *op. cit. supra* note 15, at 27, 39.

[24] Bender, *Psychopathic Behavior Disorders in Children*, in ROBERT M. LINDNER & ROBERT V. SELIGER (EDS.), HANDBOOK OF CORRECTIONAL PSYCHOLOGY 360, 362 (1947).

to society's demands than are the frankly psychotic and that, therefore, it would be only just to treat them as irresponsible.

Karpman has published important studies on these character disorders.[25] He divides them into primary and symptomatic psychopaths. He finds the latter to be in great preponderance—these are the neurotic characters who act out their basic conflicts against society. Their unbearable tension and anxiety is temporarily abated by their antisocial acts. The smaller group, the primary psychopaths, he terms anethopaths. They are the completely amoral, conscienceless individuals who have a grossly deficient superego development. They seem incapable of developing anxiety, even in their dreams. Karpman cannot find significant psychogenetic factors in the backgrounds of many of the anethopaths. In his opinion, their malfunction, in all probability, is the result of an organic brain defect.

There are, of course, many other types of psychopathic offenders.[26] Among them are the violently aggressive and sadistic criminals. In most instances, they have been subjected to harsh cruelties during their formative years in the guise of parental discipline. Life is for them not a very precious commodity—neither their own nor that of other persons.

Most of the sexual offenders, too, are neurotic criminals. It is believed that their abnormalities generally stem from subtly distorting emotional relationships with parental figures in early life. Both the abnormally seductive mother and the mother who is forbiddingly punitive and suppressive may cripple her son in his sexual development. It is now well-recognized by criminologists that many crimes that appear to be nonsexual in nature originate in psychosexual pathology. The number of offenses of this type is probably far greater than we realize.

There is a subcategory of offenders whose crimes arise from what are known as personality trait disturbances who also belong in the large, heterogeneous group of neurotic offenders. Chief among them are the passive-aggressive personalities. In this group, one finds the unusually passive, long-suffering, and nonprotesting people who occasionally, under apparently slight provocation, explode with volcanic force.

Franz Alexander, again, has written widely and informatively on the group of offenders, originally described by Freud, who engage in antisocial behavior in order to achieve punishment at the hands of the law.[27] These are individuals who are in constant conflict with themselves because of intense guilt feelings over some deeply-buried early-life experience or emotional attitude which is below the level of consciousness. Punishment by the authorities for an offense, which is frequently symbolically related to the source of their guilt, gives them surcease from their relentless self-condemnation. Their crimes are often marked by a clumsy stupidity which

[25] Karpman, *The Myth of the Psychopathic Personality*, 104 AM. J. PSYCHIATRY 523.

[26] See Guttmacher, *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS 139 (1953).

[27] FRANZ ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS 238 (1948): 4 SIGMUND FREUD, COLLECTED PAPERS 342 (1949).

makes their apprehension easy and certain. They enjoy peace of mind while under incarceration, which is lacking when living in the community. Doubtless offenders of this type exist, but in this author's experience, they are relatively rare.

The writer has been impressed by another small group of neurotic offenders who appear to court capture by the authorities. These are immature individuals who feel helpless before their own antisocial impulses and compulsions and have a real fear of them. Like the small child who runs to his parents to fix things, they turn to the authorities, feeling that in some magical way, they can help them gain control. This type of reaction is most likely to occur in sex offenders.

Heedlessness, although fundamentally self-destructive in nature, does not necessarily originate from an inner need for punishment. Great segments of the population display an amazing degree of heedlessness in their daily living, which stems from an inability or unwillingness to face issues realistically. In every city, long queues form on the day that old automobile licenses expire, waiting for hours to buy new ones, despite the fact that at the cost of a few pennies, they could have received them well in advance by mail. And one need only consider the number of persons living precariously beyond their means, who lose the many possessions they are purchasing on the installment plan as soon as they are without a job. In professional gambling, the gambler is more likely to lose than to win. Some people are psychologically motivated in their incessant gambling by a need to punish and destroy themselves. But there is little reason to believe that most excessive gamblers are of this type. A more frequent dynamic pattern in the neurotic gambler is his need to triumph over others and to achieve disproportionate and immediate rewards from what he sees as his small investment.

5. The psychotic criminal, the individual whose antisocial behavior is a symptom of his insanity. He suffers from one of the major mental disorders. These insanities are marked by regressive behavior in which the ego is overwhelmed by primitive aggressive drives. These may be directed against himself or against others. As bizarre and as unintelligible as much of insane behavior appears to be, it has an economic utility for the individual. Were we wise enough, its meaning and significance could in every instance be deciphered.

Only one and a half to two per cent of criminals are definitely psychotic. There is, of course, no sharp dividing line between health and disease. At what point the psychological disorganization of the individual reaches sufficient proportions to be designated a psychosis is a matter of judgment. This problem presents its greatest difficulty in cases of short-lived psychosis. There are cases of temporary insanity. Alcoholic deleria and confusional states associated with epilepsy are widely recognized as such. Combat psychiatrists saw men who succumbed under great stress for brief periods successfully mobilize their psychological defenses and rapidly regain their stability.

III

A diagnosis and classification of offenders along such lines is of real value because of its usefulness in disposition. Psychiatrists are unanimous in the belief that disposition must be individualized and that the focus must be on the offender rather than on the offense. They recognize, however, the dilemma to which such an emphasis inevitably leads.

The writer recently asked the Danish psychiatrist, Dr. George Sturup, the very able director of the institution for recidivistic and psychopathic criminals at Herstedvester, for his views on American penology. He said that its two most serious defects were the inequality of sentences and the huge size of our institutions. He did not see how good morale could be effected in a convict given ten years for robbery, when the man in a neighboring cell, convicted of the same offense, was serving a sentence of two years. Admittedly, this is an almost insuperable obstacle. To accept such a disparity in sentences, the criminal must recognize its rationale and its justice. And how rarely can he be made to see this. Psychiatrists would also agree with Dr. Sturup's strictures on the gargantuan proportions of most of our penal institutions. Two decades ago, it was the vogue in the United States to build huge psychiatric hospitals for the purposes of economy and efficiency. But now, the tide is running in the opposite direction. It is felt that in these great hospitals, patients lost their individuality and their ability to identify with the institution to a large degree. Dr. Sturup feels that three hundred inmates is maximum size for efficiency in both psychiatric and penal institutions.

The barren coldness of our great prisons is a manifestation of the basic philosophy behind our whole system of punishment. Its keynotes are fear and deprivation. It has its roots in moralistic and religious principles. Penitentiaries were intended to produce penitence in the wicked, who were kept in complete isolation in order to facilitate the production of this desired state of mind. Pride and vanity were evils that were antipathetic to reformation; hence, the lock-step and the prison stripes. Gluttony was taken care of with bread and water, slothfulness by useless repetitive activity like that of the treadmill, venery by isolation from sexual objects. Men were to be intimidated from repeating their antisocial behavior by the fear of the jailer's whip and of having to live again in such an environment. The noncriminal members of the community were deterred from wickedness by the fear of being subjected to it. Much of this has survived. There have been certain humane changes, but the basic philosophy has changed very little. Our reportedly mounting crime rate and our undeniably high rate of recidivism gives us reason to pause. How sound is this philosophy? It is perhaps outmoded, as outmoded as the "hell fire and brimstone" religion of old, with its concentration on fear.

The writer does not suggest that it is possible to do away with penal sanctions. For certain individuals, imprisonment undoubtedly has some curative value. There is every reason to believe that such offenses as income tax evasion and illicit gambling would increase tremendously if there were not the possibility of receiving a prison

sentence. But, the writer does believe that there is much more faith in the power of the fear of imprisonment than is merited. Moreover, there is, he believes, far more value given to the long sentence as a deterrent than is justified. Surely long sentences are desirable as a means of incapacitating serious criminals whose behavior is unmodifiable, but their value as deterrents is unproven. Many adults, living for the moment, are almost as incapable as the child in conceptualizing long periods of time, and criminals are generally recruited from their ranks. Persons most likely to be particularly impressed by the threat of prolonged imprisonment are not likely to be involved in criminal behavior.

The sole value of long sentences lies in the isolation of criminals from the community thereby effected. There is a tendency on the part of seriously aggressive criminals to become less dangerous with advancing years. Crimes of aggression are essentially crimes of youth. Whether the beneficial change with the years is attributable to the natural loss of restless energy that marks aging or results from a retarded emotional maturing, which some believe characteristic of delinquents, is uncertain. The improvement in the conduct of the young delinquent after a long prison sentence, however, is probably a natural phenomenon rather than a specific response to his incarceration, which rather tends in many cases primarily to increase his resentment toward society.

If there is any common denominator for the minds of criminals, it is their inability to face reality squarely and their ability to rationalize. The feeling that "in some magical way, I'll get away with it; I won't get caught this time," pervades their thinking. But, perhaps, this is not so unrealistic, after all, when one realizes that only one-fourth of major crimes reported to the police are followed by convictions. Cesare Beccaria's emphasis, two centuries ago, on the deterrent effects of certainty of capture and certainty of conviction,[28] is as sound today as it was then. The deterrent effect of greatly improved law enforcement has been too little appreciated.

One of the main purposes of the law—perhaps its chief one—is to create a sense of security in individuals, to give them peace of mind. In criminal law, this is achieved by the conviction of the offender. Certainly, the need for vengeance still exists. It springs from the reflex response toward retaliation when one is struck and the unconscious realization by the conformist of how he has sacrificed to restrain his own asocial impulses. This is the chief demand made of him by the process of socialization. In order to continue his sacrifices, he demands expiation from violators. There is, however, no justification in the law's pandering to the primitive demands of the mob when it cruelly cries for blood. This weakens rather than strengthens the individual's sense of security.

Psychiatrists would temper and, as far as is practical, replace the negative pattern of fear and repression which has dominated penology with the positive approach of treatment. This would have as its chief goal the production of insight in the convict—that is, an effective knowledge of oneself—an essential to real self-mastery.

[28] CESARE BONESANA BECCARIA, AN ESSAY ON CRIME AND PUNISHMENT 73, 93 (W. C. Little ed. 1872).

It would also aim to give him direction and guidance. This would necessitate a radical revision of prison ideology. As Franz Alexander has recently put it:[29]

> One cannot apply successfully all three penological principles at the same time—retaliation, intimidation, and reconstruction—as is done at present in our institutions. . . . One cannot make the prisoner hate his authorities, fear them and at the same time expect the prisoner to trust them and accept from them advice and guidance.

For the first and by far the largest group of offenders in our classification—the normal criminals—chief hope for reformation for those who are incarcerated must lie in the general rehabilitative forces of the institution. Psychiatric institutions make great use of occupational therapy. Constructive work-therapy and industrial training should play a vital role in prisons. Moving coal from one end of the jail yard to the other in wheelbarrows is surely no great improvement over the penitentiary treadmills of the eighteenth century. The commitment of a passive, motiveless, borderline mental defective to a penal institution for six months, because he has failed to work to support his family, and then forcing him to remain idle the whole time is a stupid mockery.

Of the special therapies, group psychotherapy for selected normal criminals should prove to be of great value. It was found to be successful in the Army Rehabilitation Centers during the war. In group psychotherapy, ten to twelve individuals meet under a professionally-trained leader, whose role is chiefly that of catalyst, and a great variety of topics are brought up spontaneously for discussion. Ventilation of gripes and grievances against society and the institution is encouraged. The chief value in this therapy, particularly for delinquents, is the social judgment of one's peers. The offender feels that judges, wardens, and other official big-shots do not belong in his world, their condemnations seem hollow. But when fellow prisoners condemn him for his attitudes and his behavior, it carries a powerful impact.

The second group—the occasional or accidental criminals—makes ideal probation material. It is often necessary to enlist the help of community social agencies in his cause.

The third group—the organically or constitutionally predisposed criminals—is disparate, and the treatment of its members must be based primarily on the causative factor involved. The role of intellectual deficiency as a primary crime factor is now given far less importance than formerly. Some investigators maintain that the intellectual level of the criminal population is not below that of the general population. There is, however, a small group of recidivists living in urban centers who are ill-equipped to compete legitimately with normal persons because of their deficiency. They are more likely to have a high nuisance value than to be dangerous. They adjust admirably in a farm-type prison colony. Most of the senile-deteriorative group have been involved in sex offenses with children. This may come as a

[29] FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 239 (rev. ed. 1956).

very early manifestation of their organic deterioration. Even though it may be difficult to prove that they are irresponsible under the *M'Naghten* rules,[30] they belong in a mental hospital, rather than in a penal institution. If they have family members with a sense of social responsibility, it is often possible to keep them at home under strict surveillance.

The fourth group—the psychopathic or sociopathic criminals—presents the most difficult treatment challenge. Many of them are inveterate recidivists, no matter how they have been dealt with during incarceration. Although most of them accept the realities of the prison situation and adjust to it, there is a small nucleus that forms the most difficult disciplinary segment of the prison population. The legal disposition of the psychopath is at present in a state of confusion. There is a growing tendency on the part of the law to isolate them from the general stream of criminals, recognizing that although they are not committable as insane, they are mentally and emotionally abnormal. Half of the states now have sexual psychopath statutes,[31] some of them providing for commitment to a psychiatric hospital. Many hospital administrators, however, are opposed to having psychopathic offenders sent to their institutions. They present a difficult custodial problem and are very recalcitrant to treatment.

They occasion special confusion in the District of Columbia, which employs as the test of criminal responsibility the *Durham* rule,[32] which states that if the defendant has a mental disease and his alleged criminal act is a product of it, he is insane. There is disagreement among psychiatrists, however, as to whether psychopathy should be considered a mental disease or merely a character deformity. The Royal Commission on Capital Punishment and the tentative draft of the Model Penal Code of the American Law Institute, both attempt specifically to exclude psychopathy as a cause of criminal irresponsibility.[33] Yet, under the standard system of classification of the American Psychiatric Association, this is one of the subgroups under "Mental Disorder."[34] The distinction between mental disease and mental disorder offers a real problem for semantic specialists.

Maryland now handles this problem in a rather unique way. Instead of a special sexual psychopath statute, it has enacted a defective delinquent statute, which is broader in scope.[35] It seemed to the writer and other members of the commission which drafted this statute, wise to consider all the emotionally-maladjusted criminals as a unit, rather than to isolate only those guilty of sexual offenses. The statute specifies that the intellectually-defective and the emotionally-unbalanced criminals who

[30] See M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843).

[31] For more detailed discussion of these statutes, see Comment, *Use of the Indeterminant Sentence in Crime Prevention and Rehabilitation*, 7 DUKE L. J. 65, 72-80 (1958).

[32] See Durham v. United States, 214 F.2d 862 (D.C Cir. 1954).

[33] ROYAL COMM'N ON CAPITAL PUNISHMENT, REPORT 139 (1953); MODEL PENAL CODE 160 (Tent. Draft No. 4, 1955).

[34] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL 85 (1952).

[35] MD. ANN. CODE art. 31B, §§ 1 *et seq.* (Supp. 1957). For general discussion of these statutes, see Comment, *supra* note 32, at 80-85.

have demonstrated a propensity to become involved in criminal behavior which is dangerous to society and who are not insane may, upon conviction and sentencing, be sent to the Patuxent Institution. There, they are carefully studied by psychological and psychiatric techniques to determine whether, in the opinion of the professional staff of the Institution, which is directed by a psychiatrist, they should be diagnosed as defective delinquents. If the decision is affirmative, their counsel may seek independent psychiatric opinion at the expense of the state. The issue of defective delinquency is then tried before the court as a civil issue. If a defendant is found to be a defective delinquent, the original sentence is revoked and he is indeterminately committed to the Patuxent Institution. There, he is given specialized treatment which emphasizes group psychotherapeutic techniques, although individual therapy and other methods of treatment are also employed. If and when the institutional Board of Review feels that he is ready to live outside of the Institution, he is released on a probationary status. During this period, he continues to see a psychiatrist regularly. Whenever possible, he continues treatment under the therapist who worked with him in the Institution.

Maryland's defective delinquent statute gives recognition to several salient realities: there are degrees of responsibility and abnormality, and not just the sane and insane; certain offenders are impelled to carry out antisocial acts because of mental abnormality which does not meet the criteria of psychosis or legal insanity; these individuals can be most effectively treated in a special type of institution which has the salutary features of a hospital and the necessary features of a penal institution; and, above all, the cornerstone of the criminal law is the protection of society.

Of course, some of those committed to such an institution will have to remain incarcerated for a very long period—in some instances, for life. Under the ordinary determinate sentence, one is often forced to release men with malignant characterological defects, who, one knows, will soon again be involved in dangerous crime. Many of the defective delinquents have personality traits which render their treatment very difficult; chief among these are: basic distrust of everyone, an incapacity for establishing meaningful relations with others, and a need for immediate gratification of impulses. Yet, Alexander, who has had wide experience in dealing with these patients and is an outstanding therapist, considers the neurotic character to be closer than the ordinary psychoneurotic patient to the normal individual and favorable material for therapy.[36]

The fifth group—the psychotic criminals—presents no real difficulty as to disposition. They are sent to the criminal division of state psychiatric hospitals for appropriate psychiatric treatment. In passing, however, the writer might observe that invariably this is the most unattractive, ill-equipped, and poorly-staffed division of our state psychiatric hospitals.

The method of commitment of these psychotic offenders varies greatly. Because

[36] FRANZ ALEXANDER & HUGO STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 102 (rev. ed. 1956).

of the general dissatisfaction with the *M'Naghten* rules of responsibility found among psychiatrists as well as among many leaders of the bench and bar, and in order to prevent the injustices these rules may occasion, there is a growing tendency in this country and in England to commit summarily to hospitals even mildly psychotic defendants and never to bring them to criminal trial. Although this is, in many respects, desirable, it is not wholly unobjectionable. This procedure automatically stops the investigative efforts of the police. And although it results in sending a psychotic person to the hospital, there may be no real certainty that he was the perpetrator of the particular crime. A complete trial of the issue involved, therefore, gives the public a greater feeling of security that open-handed justice has been done. Moreover, there are some psychotic offenders, particularly those who are paranoid, who prefer to have their day in open court and are more easily handled during their hospitalization if they have had it. Of course, no one would advocate the mockery of subjecting a grossly insane defendant to a criminal trial.

IV

There are certain principles in regard to the treatment of criminals upon which there would be general agreement among psychiatrists. The value of prevention over treatment of criminality would be emphasized. Criminals rarely come from homes in which there was strong parental affection and kindly, consistent discipline. Loyalty to a cohesive family group, in which there was clearly present the attitude of one for all and all for one, is a powerful force against delinquent behavior. Combatting the great social scourges of poverty, overpopulation, and social and job inequality are necessary steps in crime prevention. A school system with special facilities for diagnosing and efficiently handling children with learning and behavioral difficulties is essential. Adequate recreational facilities in urban areas, so that children can dissipate their energies in constructive rather than destructive activities is of proven value. The role of crime and horror programs, presented through mass media, in the production of juvenile delinquency is, as yet, unknown. That it might be great must be admitted; but this is far from proven. It offers an important subject for carefully controlled research. Whether the down-graded valuation of human life and the insecurity that comes with wars and the concentration on weapons of destruction are responsible for the reported increase in violent crimes committed by youths today is also a significant subject for study.

Juvenile courts should have adequately-staffed psychiatric clinics attached to them for the purposes of diagnosis and the treatment of selected cases. Juvenile court judges should be specialists, trained in the behavioral sciences. Probation officers should have special training and should have case loads sufficiently small to permit them to work intensively with the delinquents and their families. Training schools for delinquents should be small, with large, competent staffs trained in group therapy. All communities should have access to special psychiatric institutions for the care and treatment of children who are severely disturbed emotionally.

Adult criminal courts should have psychiatric clinics attached to them, so that sentencing judges can have the benefit of psychiatric and psychological studies in selected cases before disposition. The focus of such reports must be on the basic character structure of the defendant, with special attention directed toward his treatability and the social threat afforded by his release into the community. Preempting judicial functions must be sedulously avoided. The preservation of the "father figure," wisely and justly punishing transgressors, is worthy of preservation by society. The clinic report should not deal with the guilt or innocence, the general deterrent effect on community members of the punishment of the defendant, nor the attention to be paid to the demands of the community for retaliation. As yet, the psychological disciplines have no definitive knowledge to contribute on these issues, and they are best left solely to the discretion of judicial authority.

Probation and parole officers should have special training in social case-work techniques. Several of the larger communities are now offering didactic courses and seminars in psychology and psychiatry for probation officers.

As far as this writer knows, there are, as yet, no psychiatric out-patient departments specifically designed for treating defendants while on probation. Were there such a facility, it would be possible to recommend probation in certain cases in which this is now not practical. As a rule, hospital out-patient departments will treat these patients, but they are, to a certain extent, stigmatized and are not eagerly welcomed. Moreover, attendance in nearly all clinics must take place during the week's working hours, which may seriously interfere with the work adjustment of these individuals, who are already laboring under a handicap. A clinic to treat probationers successfully must operate during evening hours. Moreover, junior residents and the advanced students, who generally form the nucleus of out-patient therapists, are not equipped to minister to such patients. They are difficult to treat and require skilled and experienced therapists for both individual and group psychotherapy. To obtain the maximum number of successes in treatment, it would be necessary to employ specially-equipped probation officers as the clinic staff social workers. Selection of probationers for out-patient psychotherapy would be limited to those cases which the psychiatrist, advising the court on disposition, considered favorable treatment prospects.

In regard to the treatment of individuals incarcerated in penal institutions, psychiatry would emphasize individualization. Attempts over the years to crush the rebellious spirit by lock-step, prison uniforms, prohibition of personal decorations in cells, referring to inmates by number, etc., have apparently failed. The building of huge institutions is in line with this policy. To be sure, they can be more economically run. But, if it be true that their size offers an obstacle to their primary objective—rehabilitation—their economy of operation would prove to be illusory. It is our experience that most criminals have marked feelings of inferiority, and building up their self-image rather than tearing it down further seems the desirable goal in the vast majority of cases.

Needless to say, there is need of intensive psychological and psychiatric study of prisoners after they have entered the prison system, so that they can be assigned to the proper facilities to meet their specific needs. Literacy training and physical rehabilitation are to be taken for granted. Those with aptitudes for acquiring special industrial skills should be given instructions. The success in this area achieved at Walkill Prison in New York is noteworthy.

Certain prisoners should be chosen for special training in group living. This has been highly developed by Dr. George Sturup in the institution for serious offenders at Herstedvester, Denmark. There, the less than two hundred inmates are divided into groups of fifteen to twenty. Each individual group lives in the same dormitory, works in the same shop, and eats together in the small dining room. The group has its own custodial officers. Group therapy sessions are held daily. There develops mutually sustained pressure by members of the group toward social conformity during twenty-four hours of the day. Hedonism gives way gradually to communalism.

Undoubtedly, behavioral scientists would advocate the use of indeterminate sentences as far as is practical. No individual can be gifted with divine prescience. The value of the indeterminate sentence is, in large measure, dependent upon an accurate determination by institutional staffs and releasing authorities of the prisoner's adjustment and changes in attitude during his incarceration. That an acceptable degree of excellence by these staff personnel is seldom available must be admitted.

Radical treatment methods of criminals have been tried sporadically. The reports of the few lobotomies performed have not been favorable. Electroshock has also been used, but with no lasting benefits reported. Even on theoretical grounds, improvement could be hoped for only with the use of intensive electroshock therapy, necessitating the use of a great number of treatments given in close succession. This has been used in treating schizophrenics. It produces a temporary regression of the individual to an infantile level, with incontinence, almost complete loss of memory, etc. It is not without danger of permanent brain damage. According to its advocates, it breaks up old thought patterns and facilitates the creation of new attitudes. Hypnotherapy has also been used in treating criminals. Its value lies not so much in the creation of new, powerfully suggested modes of behavior, as in uncovering the basic dynamics behind the criminal acts of certain character neurotics.

Tranquilizing drugs are being rather widely tried. They are of great value in the handling of certain tense, restless, and rebellious prisoners. It also often makes them more receptive to group therapy and individual psychotherapy when they are available.

Castration has been employed in Europe for decades in the treatment of sexual offenders.[87] Many of the reports have been very favorable. The general attitude among medical and legal leaders in this country, however, is that it is cruel and inhumane punishment. Furthermore, scientific objection has been registered against it on theoretical grounds. If sex offenses are the response of character neurotics to

[87] See M. S. GUTTMACHER, SEX OFFENSES 105 (1951).

deep-seated conflicts, removal of the gonads should not cure them, but rather lead to their expression through different channels. One must admit, however, that our knowledge of sexual pathology is as yet very uncertain. But to the writer, it seems unwise to shut our minds completely to the possible good that may result from the use of castration in the rare and very cautiously selected case. Perhaps it is, after all, more humane than permanent incarceration for the dangerous recidivistic sex offender.

A CRITIQUE OF THE PSYCHIATRIC APPROACH TO CRIME AND CORRECTION

MICHAEL HAKEEM*

I

THE INFLUENCE OF PSYCHIATRISTS

The opinion of psychiatrists can have substantial or decisive influence in the determination of whether an offender is fit to stand trial, whether he is responsible for a crime, and whether he is to be executed or given a life sentence. It can play an important part in the decision whether to place him on probation or to send him to a correctional institution. It can, in many instances, affect the duration of the offender's penal servitude, the choice of the particular institution to which he is sent, his subsequent transfer to other institutions, and his activities within the institution. It can sway the estimate of his suitability for parole or pardon.

In jurisdictions having special sex offender laws, the psychiatrist's opinion is usually determinative of whether such an offender is to be dealt with under the customary procedures or under the provisions of these laws. In the latter event, he is released only on the psychiatrist's recommendation, and he can be confined for life. Some psychiatrists have insisted that such procedures should be extended to all offenders. They propose that the law should enable the lifelong incarceration or supervision of any offender, on the recommendation of a psychiatrist, even if his crime were only a minor one. As long ago as 1928, a committee of the American Psychiatric Association, under the chairmanship of Dr. Karl A. Menninger, recommended the "permanent legal detention of the incurably inadequate, incompetent, and anti-social offenders irrespective of the particular offense committed. . . ."[1] Not one of the terms used in this grim scheme was defined. It was not even explained how an "antisocial" offender differs from one who is not antisocial. Not a scintilla of evidence was presented that psychiatrists, or anyone else, could distinguish between incurable and curable offenders. Another suggestion on this order has been voiced more recently by a psychiatrist and a law professor in the following statement, which should occasion alarm in any schoolboy who has fully appreciated the implications of his lessons in eighth-grade civics: ". . . [I]f analysis of the convict's personality indicates that he cannot safely be released, he may have to spend the rest of his life under legal supervision of some kind, even though the only crime he has actually committed was a minor one."[2]

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[1] Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. CRIM. L. & CRIMINOLOGY 367, 376 (1928).

[2] MANFRED S. GUTTMACHER & HENRY WEIHOFEN, PSYCHIATRY AND THE LAW 444-45 (1952).

The juvenile delinquent is also much at the mercy of psychiatrists. Adjudication as a delinquent, commitment to and release from various institutions, separation from home and family, placement in a foster home, the granting of probation, and a host of other decisions can depend largely on what a psychiatrist advises.

Psychiatrists have been engaged for a long time in a relentless and extensive campaign to extend the scope and power of their influence in the administration of justice, in the disposition of offenders, and in the policies and practices of correctional institutions and agencies. This campaign has now reached reckless and irresponsible proportions, and there has been resort to questionable tactics. Unseemly as it may appear, the profession of psychiatry has even gone so far as to bestow prizes, honors, and unabashed flattery upon judges who have handed down decisions that it views as favorable to its cause. And, in the service of this campaign, psychiatrists have produced a prodigious literature, much of which is propagandistic in nature. It is characterized by incautious and immodest effusions, misrepresentation, extraordinary contradictions, flagrant illogicalities, grossly-exaggerated claims, biased selection of data, serious errors of fact and interpretation, ignorance of the distinction between scientific questions and value judgments, lack of sophistication in research methodology, tautological trivialities presented in the guise of technical profundities, and language, subject matter, and procedures not bearing the slightest resemblance to anything medical.[3]

Some psychiatrists have insisted that they are still greatly hampered in their forensic work by certain traditional concepts, procedures, and laws governing the prosecution and disposition of offenders, and they have furiously assailed these restraining formalities. They hold that many of the basic tenets of American jurisprudence, which are designed to protect the rights of offenders, and many of the limitations on administrative discretion in the handling of offenders are "stupid" and should yield to make way for psychiatric knowledge. They argue that the law frustrates their desire to deal with offenders in ways they deem best. Menninger puts the general idea as follows: "The scientific attitude as shown in psychiatry must sooner or later totally displace existing legal methods."[4] And he hurls this further challenge: ". . . [M]ust the lawyers still continue solemnly to apply mediaeval

[3] A number of psychiatrists have leveled all these criticisms, and others besides, against their colleagues. Wertham, to cite only one, has reviewed some of the literature on forensic psychiatry, and he finds it dangerous, erroneous, misleading, deceptive, highhanded, uninformed, unreliable, confused, unscientific, tautological, biased, and grossly defective in other ways. See the following for references to some of Wertham's reviews in which these criticisms are found: Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 n. 1 (1955). For the most brilliant and scholarly appraisal of the literature on forensic psychiatry and of the issues in the question of criminal responsibility, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW c. 14 (1947); *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761 (1956).

[4] KARL A. MENNINGER, THE HUMAN MIND 448-49 (3d ed. 1945). Since making this statement, Menninger apparently has had some second thoughts. He now confesses that it is "an open professional secret" that psychiatrists do not know how to treat offenders. He also concedes that they cannot predict the possible dangerousness of such offenders. And he points out that psychiatrists are not even available for such work or for even doing research on the problem. See Menninger, *Book Review*, 38 IOWA L. REV. 697, 701-02 (1953).

stupidities in the name of 'established precedent,' 'public policy,' and other mouthy archaisms?"[5] It is these trends, developments, and pressures that recently prompted a lawyer to suggest: ". . . [I]f the criminal were in any position to elect between the psychiatrist and the jurist as the future guardian of his liberties, he may be well advised . . . to re-elect the jurist."[6]

During the past several years, psychiatrists have been emboldened to increasing arrogance because some judges and lawyers have finally shown greater disposition to yield to their blandishments and entreaties. No less a person than Supreme Court Justice William O. Douglas recently gave psychiatrists warm encouragement in their efforts to shape the administration of justice. Speaking at the graduation exercises of the William Alanson White Institute of Psychiatry, Psychoanalysis, and Psychology, he reassured them that "recent developments in the law should hearten psychiatrists that their pleas do not always fall on deaf ears."[7] Justice Douglas presented no evidence whatsoever that he had assayed psychiatric knowledge to determine whether its scientific creditability merited such a friendly gesture. In fact, practically all his psychiatric citations were drawn from the propagandistic literature referred to above.

The most important step taken in recent years bearing on the relationship between psychiatry and the law is, of course, the decision in the *Durham* case, handed down in 1954 by the United States Court of Appeals for the District of Columbia.[8] This decision was written by Judge David L. Bazelon and concurred in by Judges Henry W. Edgerton and George T. Washington. It overthrew the existing test of criminal responsibility and adopted a new and broader test similar in type to that for which psychiatrists have long been agitating. There can be no doubt that the basic motivation of this decision was to "recognize" psychiatry. This is precisely what Fortas, who was the court-appointed attorney representing Durham before the Court of Appeals and who advocated the adoption of the new test, sees as its chief significance.[9] Very revealing, from the point of view of the motivations operating in some of the champions of psychiatry, is this further observation by Fortas, still referring to the *Durham* decision: "Its importance is that it is a charter, a bill of rights, for psychiatry. . . ."[10] An examination of the *Durham* decision itself leaves no doubt that it was designed to overcome psychiatric objections to the prevailing legal views on criminal responsibility.

Anyone familiar with the psychiatric journals and the literature on forensic psychiatry does not need to have documented the wild elation with which the *Durham* decision was acclaimed. Judge Bazelon himself could not have been idolized more had he discovered the cause and cure of schizophrenia, which, inci-

[5] KARL A. MENNINGER, THE HUMAN MIND 449 (3d ed. 1945).
[6] De Grazia, *The Distinction of Being Mad*, 22 U. CHI. L. REV. 339, 352 (1955).
[7] WILLIAM O. DOUGLAS, LAW AND PSYCHIATRY 6 (1956).
[8] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
[9] Fortas, *Implications of Durham's Case*, 113 AM. J. PSYCHIATRY 577, 581 (1957).
[10] *Id.* at 579.

dentally, is conceded to be the most serious mental disease and one about which, some psychiatrists are frank to admit, knowledge is practically nil.[11] Fulsome praise was certainly heaped upon Judge Bazelon. Forensic psychiatrists said that they were astonished and captivated by the depth and breadth of his medical knowledge and his comprehensive familiarity with medical and psychiatric literature. The following statement, made by a leading forensic psychiatrist, typifies the commentaries of this sort: "To this author, who has had very limited experience in reading legal opinions, it is indeed encouraging to find in this opinion such a wide study of the technical medical literature and such a thorough understanding of it."[12]

Now, an actual examination, item by item, of the citations in the *Durham* decision will show the complete absence of any reference to "technical medical literature" and will show that practically all the psychiatric citations are to the propagandistic literature whose defects have been already noted. Most of this literature contains nothing medical and practically nothing psychiatric. It contains mainly pleas and proposals, based in no small measure on the value judgments of psychiatrists, for changes in the laws, in criminal trial procedures, and in correctional policies. The *Durham* decision is not based on a competent and objective appraisal of the truth of psychiatric claims and of the pretensions of psychiatry to scientific knowledge. As a matter of fact, it is a highly-biased decision, in as much as it completely disregards the large number of researches and extensive theoretical discussions that have yielded adverse appraisals of psychiatry. But no matter, for the jubilation of psychiatrists was so lasting and unsubduable that more than three years after the *Durham* decision, the American Psychiatric Association officially honored Judge Bazelon. He was presented a "Certificate of Commendation" for what he had done for psychiatry, though it was not put quite that way, of course.[13]

An excellent example of how important and even momentous decisions are sometimes made on the basis of crass naïveté is provided by the deliberations of the American Law Institute on the question of criminal responsibility in connection with its preparation of a Model Penal Code. One would have supposed that before formulating its recommendations regarding the complex and crucial question of psychiatric testimony and the procedures for handling the plea of insanity, the American Law Institute would have tried to come to an independent assessment of the nature, methodological soundness, theoretical coherence, logicality, predictive efficacy, objectivity, reliability, and validity of psychiatric research, contentions, and premises. One would have supposed that, at the very least, the Institute would have wanted to look into the question of the reliability and validity of psychiatric judgments. The course actually followed by the Institute, however, could not have deviated more from this procedure. It sought the advice of three psychiatrists. Two of these have been in the forefront of the assault on the criminal law and have been

[11] Hoch, *The Etiology and Epidemiology of Schizophrenia*, 47 AM. J. PUB. HEALTH 1071, 1074 (1957): Heath, *Psychiatry*, in 5 ANN. REV. MED. 230 (1954).

[12] Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 330 (1955).

[13] *Judge Bazelon Honored*, 114 AM. J. PSYCHIATRY 565 (1957).

leaders in the campaign to promote forensic psychiatry. The American Law Institute depended for its recommendations mainly on a brief memorandum prepared by one of these advisers.[14] This memorandum is misleading, grossly exaggerates the scientific status of psychiatric knowledge, does not present the available contradictory or nonconfirmatory data on various points asserted in it, and fails to make reference to even one of those psychiatrists who have denied that their profession has knowledge that would be of much help in the administration of justice.[15] In addition to this memorandum, there was a "chummy" exchange of correspondence between the psychiatrist who prepared the memorandum and the Chief Reporter of the Institute's Model Penal Code project, by means of which the latter sought to learn about psychiatry and to secure clarification on various issues, particularly, one gets the distinct impression, to determine just what it is the psychiatrists want from lawyers.[16]

In view of the increasing importance of psychiatry in the fields of criminology, law, and corrections, the recent tendency of the law to embrace psychiatry to a greater extent than ever before, the unfortunate practice of some judges and lawyers to embark on this new course without thinking it necessary to inform themselves about psychiatry, and the fact that the glibness of some psychiatrists is in danger of being exceeded by the gullibility of some members of the legal profession, it becomes particularly imperative to scrutinize psychiatric knowledge and contentions. The present paper will review only a limited portion of these—namely, the psychiatric view of delinquency and crime as disease, the reliability of psychiatric diagnosis, and the two mental diseases most often discussed in connection wth delinquent and criminal behavior.

II

DELINQUENCY AND CRIME AS DISEASE

A journal bearing the redoubtable title, *Postgraduate Medicine*, published in one of its volumes such formidable reports as "Atresia of the Esophagus With or Without Tracheo-Esophageal Fistula" and "Herniated Cervical Intervertebral Disk Simulating Angina Pectoris." Among these and other equally weighty disquisitions, in the same volume, appeared an article with this starkly simple title: "Medical Responsibility for Juvenile Delinquency."[17] This was by a psychiatrist. It contained the usual rebuke of the law for not implementing psychiatric preachments about delinquency, along with an admonition to all who deal with this problem to accept medical concepts regarding it. In the meantime, the medical journals have been carrying an increasing number of articles on delinquency and crime.

[14] Guttmacher, *Principal Difficulties with the Present Criteria of Responsibility and Possible Alternatives*, MODEL PENAL CODE app. B (Tent. Draft No. 4, 1955).

[15] To cite only the latest of these, Szasz says: "I . . . want to suggest, at the very least, that the current popular belief that psychiatry has much to contribute to jurisprudence may be ill-founded and misleading." Szasz, *Psychiatric Expert Testimony—Its Covert Meaning and Social Function*, 20 PSYCHIATRY 313, 314 (1957).

[16] MODEL PENAL CODE app. C (Tent. Draft No. 4, 1955).

[17] Blackman, *Medical Responsibility for Juvenile Delinquency*, 10 POSTGRAD. MED. 499 (1951).

In the series of articles on crime that appeared in *Life* several months ago, there was displayed a dramatic photograph of a criminal whose brain waves were being examined by doctors in a clinic. The caption explained that this was done to determine whether the offender needed "surgery" or "psychiatry."[18]

Recently the New York Temporary State Commission on Youth and Delinquency issued a report summarizing a large number of hearings it had held throughout the state to get a public airing of views on all aspects of delinquency. Hundreds of people were heard. The report concluded that the psychiatric orientation emerged as the most popular approach to the understanding, prevention, and treatment of delinquency.[19]

In the course of a symposium on crime, Edwin J. Lukas, who is a lawyer and former executive of a crime prevention agency, stated that if the matter were looked at from the proper perspective, "the parallel between crime and physical illness becomes almost exact."[20]

These are all merely incidents exemplifying the operation and impact of an orientation vigorously promoted by psychiatrists: Delinquency and crime are medical problems. Some put the proposition in so many words, simply and tersely, as when one psychiatrist claims that "juvenile delinquency is a medical problem. . . ."[21] Some state it more elaborately: ". . . [T]he whole problem of criminality or criminology is in the field of human behavior psychopathology, the understanding of which requires medical and psychiatric training."[22] Sometimes it is phrased colorfully: "The modern surgical operating amphitheater developed out of dirty public barber-shops. The physicians took surgery away from the barbers a century ago; now they are taking criminology away from jailers and politicians."[23] Sometimes it takes the form of an even more explicit battle cry: "Criminology today, like demonology of yesterday, is a battlefield for the rightful possession of which the psychiatrist is still fighting."[24]

Certain premises underlie the view that delinquency and crime are medical problems. These premises are, of course, that these phenomena constitute disease and that offenders are "sick people." This notion, too, is put in a rich variety of

[18] Life, Oct. 7, 1957, p. 160. Neither the caption nor the story related the experiment in which ten EEG records were submitted to five well-known electroencephalographers for independent interpretation. On only four out of the ten was there agreement on the presence or absence of pathology; on only three out of the ten was there agreement on localization of the pathology; and on only one out of the ten was there agreement on the two factors combined. See Blum, *A Note on the Reliability of Electroencephalographic Judgments*, 4 NEUROLOGY 143 (1954). No psychiatrist protested this omission, despite the fact that the American Psychiatric Association has been much concerned with securing accurate reporting of news about psychiatry to the public.

[19] N.Y. TEMPORARY STATE COMM'N ON YOUTH AND DELINQUENCY, YOUTH AND DELINQUENCY 78 (1956).

[20] Lukas, *A Criminologist Looks at Criminal Guilt*, in EDMOND N. CAHN (ED.), CRIMINAL GUILT 145 (Social Meaning of Legal Concepts No. 2, 1950).

[21] EUGENE DAVIDOFF & ELINOR S. NOETZEL, THE CHILD GUIDANCE APPROACH TO JUVENILE DELINQUENCY 150 (1951).

[22] Seliger, *Criminal Hygiene*, Fed. Prob., Jan.-March 1946, pp. 16, 19.

[23] KARL A. MENNINGER, THE HUMAN MIND 451 (3d ed. 1945).

[24] GREGORY ZILBOORG & GEORGE W. HENRY, A HISTORY OF MEDICAL PSYCHOLOGY 419 (1941).

ways. One psychiatrist calls delinquents "seriously sick children."[25] Another says that knowledge of psychopathology is the "only means of preventing crime."[26] Often delinquency is listed along with "neurosis, psychosis, and psychosomatic illness" to underscore the idea that it is just another mental illness to be encompassed within the same frame of reference as any other.[27] Another example of this practice is provided by a committee of the House of Representatives. After a "health inquiry" at which psychiatrists testified, the committee issued a report wherein mental illness subsumes delinquency.[28] Sometimes, the point is set forth calmly, as in Glueck's sedate but unconvincing argument that some of the knotty legal issues in criminal responsibility would be eased if crime were viewed as a sickness and not as a moral transgression.[29] More often, it is proclaimed ardently, as in the following statement by Karpman, promulging the policy of a journal established and edited by him: "The Archives will fight vigorously for the recognition of criminal psychiatry. It will fight for the recognition of the criminal as a very sick person, much sicker than either psychosis [*sic*] or neurosis [*sic*]. . . ."[30]

But greatest effectiveness in drumming the ideology that delinquency and crime are disease and offenders are sick is probably not achieved when it is explicitly propounded, whether vociferously or quietly. More persuasive is its exposition unaccompanied by any theoretical elaboration in defense of it, as though there could be no question in the world about the truth of the matter. And resort to the ubiquitous medical analogy clinches this subtle form of presentation. To illustrate, one psychiatrist says:[31]

> Using medical terms delinquency can be described as a very widespread illness, affecting mainly young people and causing gross symptoms [in certain proportions of this population]. . . . [M]ild cases usually are treated at home. . . . The illness, on the whole, is benign. Unfortunately [after recovery, in certain proportions of cases] it is followed by relapses. The illness then takes a prolonged course but even then in most cases heals off.

Another says that "theft, like rheumatic fever, is a disease of childhood and adolescence, and, as in rheumatic fever, attacks in later life are frequently in the nature of recurrences."[32] A third puts it as follows: "When a patient goes to the hospital with a physical illness, he receives medication and therapy directed spe-

[25] Eveoleen N. Rexford, in DOUGLAS A. THOM CLINIC FOR CHILDREN, INC., ANN. REP. 17 (1956).
[26] Ruth S. Eissler, *Scapegoats of Society*, in K. R. EISSLER (ED.), SEARCHLIGHTS ON DELINQUENCY 304 (1949).
[27] GEORGE J. MOHR & MARIAN A. DESPRES, THE STORMY DECADE: ADOLESCENCE 210 (1958).
[28] House Committee on Interstate and Foreign Commerce, *Health Inquiry*, H.R. REP. No. 1338, 83d Cong., 2d Sess. 123 (1954).
[29] Glueck, *Changing Concepts in Forensic Psychiatry*, 45 J. CRIM. L., C. & P.S. 123, 127 (1954).
[30] Karpman, *Criminal Psychodynamics: A Platform*, ARCH. CRIM. PSYCHODYN. 3, 96 (1955).
[31] Balint, *On Punishing Offenders*, in GEORGE B. WILBUR & WARNER MUENSTERBERGER (EDS.), PSYCHOANALYSIS AND CULTURE 254, 266 (1951).
[32] Bowlby, *Forty-Four Juvenile Thieves: Their Characters and Home-Life*, 25 INT'L J. PSYCHO-ANAL. 19 (1944).

cifically to his ailment. . . . We send our children to correctional institutions to be treated for an illness. . . ."[33]

So powerful is the conviction of some psychiatrists that crime stems from mental disease that they have held the commission of crime in itself constitutes conclusive evidence of the presence of mental disease. Again, this aspect of the ideology usually draws on the medical analogy. The thesis runs as follows: Just as fever is a symptom of physical disease, so crime is a symptom of mental disease. The following excerpt provides an example of just such a formulation: ". . . [J]ust as symptoms of physical illness are danger signals that call for remedial measures, a criminal act, in a high percentage of cases, is a signal of psychological distress and a natural appeal for remedy."[34] A like conclusion has been reached by many psychiatrists, another one of whom writes: "It is becoming increasingly apparent that chronic incorrigible criminal behavior is symptomatic of mental disease. . . ."[35] About thirty years ago, Menninger hopefully prophesied that "the time will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease, a personality disease, if you will. . . ."[36] Twenty-five years later, another psychiatrist expressed the identical sentiment: "One may hope that a day will come when the very fact of having committed a crime will be regarded as evidence of a mental disease. . . ."[37] As early as 1930, the American Medical Association, acting on the recommendations of representatives of medicine, psychiatry, and law, officially went on record in support of the view that a diagnosis of mental disease is permissible "even when the criminal has shown no evidence of mental disease other than his criminal behavior."[38]

In the meantime, some psychiatrists have shown disdain for the legal presumption of sanity, which one dismisses, redundantly, as that "hoary old legal dogma."[39] It has been proposed by more than one psychiatrist that the law should presume not sanity, but insanity. One of these has commented that the legal doctrine of the "reasonable man" does not square with the findings of modern psychiatry. He intimates that the law should replace the presumption of sanity with the presumption of insanity, so confident is he that the offender is more likely to be insane than sane.[40]

However it is put, the irrepressible and irresponsible campaign—for that is what it is—to implant the view that crime and delinquency are disease and offenders are sick people has had great impact. The public, as well as important officials, is more and more coming to actually believe the physicians who tell it that the criminal is a

[33] Tarrasch, *Delinquency Is Normal Behavior*, 29 FOCUS 97, 101 (1950).
[34] RALPH S. BANAY, WE CALL THEM CRIMINALS 6 (1957).
[35] LOUIS LINN, A HANDBOOK OF HOSPITAL PSYCHIATRY 331 (1955).
[36] Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. CRIM. L. & CRIMINOLOGY 367, 373 (1928).
[37] BENJAMIN KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 218 (1954).
[38] *Psychiatry in Relation to Crime*, 95 A.M.A.J. 346 (1930).
[39] Overholser, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322, 329 (1936).
[40] Poindexter, *Mental Illness in a State Penitentiary*, 45 J. CRIM. L., C. & P.S. 599, 562 (1955).

sick person in need of medical treatment. Fortas, who has already been cited, thinks that the *Durham* decision and other decisions which show a greater acceptance of psychiatric doctrines by the courts indicate that the judges involved "suspect that mental disorders may figure in criminal activities with vastly more frequency than is currently recognized by our legal procedures. . . ."[41] If Fortas is correct, then these judges are showing remarkable resoluteness, even if their conclusion is nothing but a surmise. All the more so because they have presented no scientific evidence to substantiate even a "suspicion," and particularly so in view of the fact that, though these judges may have at least tentatively made up their minds on the matter, psychiatrists are in a state of complete disaccord about it.

For, though it is true that the psychiatric propagandists have gained widespread support for their ideology and have succeeded in getting judges, lawyers, correctional administrators, and others to implement it, the psychiatric profession does not present a united front on this issue. As is true in regard to practically every fundamental postulate in psychiatry, so in regard to this problem, there is vast disagreement, confusion, and contradiction. This can be documented by a few citations, remembering that these constitute an insignificant proportion of those that could be assembled.

One psychiatrist thinks that all offenders show traits differentiating them from nonoffenders,[42] but another says that the great majority do not vary much from the average person.[43] Another psychiatrist advises that "no one would maintain that *all* criminals are mentally ill or abnormal,"[44] thereby showing unfamiliarity with the writings of Karpman and scores of others who maintain exactly that.[45] Menninger gives the assurance that psychiatrists "do not consider that many offenders in our prisons are mentally sick . . . ,"[46] thus overlooking a large number of psychiatrists who have contended just the opposite.[47] Schilder maintains that "the majority of criminals are normal . . .";[48] however, Abrahamsen counters that "the 'normal' offender is a myth. . . ."[49] East has concluded that the "mentally abnormal criminal is the exception and not the rule . . . ,"[50] a view challenged by another psychiatrist who claims that "one does not expect anti-social conduct from normally constituted individuals. . . ."[51] Neustatter decries what he calls the "fallacy" of

[41] Fortas, *supra* note 9, at 577-78.

[42] Henderson, *Psychopathic Constitution and Criminal Behaviour*, in L. RADZINOWICZ & J. W. C. TURNER (EDS.), MENTAL ABNORMALITY AND CRIME 106 (English Studies in Criminal Science No. 2, 1944).

[43] Schmideberg, *The Analytic Treatment of Major Criminals: Therapeutic Results and Technical Problems*, in EISSLER, *op. cit. supra* note 26, at 174.

[44] DAVID STAFFORD-CLARK, PSYCHIATRY TO-DAY 221 (1952).

[45] BENJAMIN KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENCES 562 (1954).

[46] WILLIAM C. MENNINGER, PSYCHIATRY: ITS EVOLUTION AND PRESENT STATUS 123 (1948).

[47] Haugen, Coen, & Dickel, *Possibilities of Psychotherapy in Prisoners*, 31 FOCUS 83 (1952).

[48] PAUL SCHILDER (ARR. BY LAURETTA BENDER), PSYCHOANALYSIS, MAN, AND SOCIETY 238 (1951).

[49] DAVID ABRAHAMSEN, WHO ARE THE GUILTY? 125 (1952).

[50] NORWOOD EAST, SOCIETY AND THE CRIMINAL 228 (1951).

[51] Peskin, *The Modern Approach to Legal Responsibility, the Psychopath and the M'Naghten Rules*, 1 FORENSIC MED. 189, 191 (1954).

regarding all criminality as psychological illness,[52] but many psychiatrists share the opinion that "every criminal has a defective personality. . . ."[53] Regarding juvenile delinquents, one psychiatrist is satisfied that "the largest percentage" of serious delinquents is normal,[54] but this is offset by another who is satisfied that all juveniles who are in repeated trouble are "mentally ill."[55] English and Pearson, the well-known child psychiatrists, write that the psychiatrist "does not believe that all delinquents are sick people . . . ,"[56] but they fail to cite Bender, a well-known child psychiatrist, who insists that she does not understand what is meant by "normal delinquency."[57] Regarding murder, Glueck finds that no murderer is normal when he commits his crime,[58] only to be contradicted by another practitioner who finds that there are normal murderers.[59]

One would have supposed that this muddle in itself would have been sufficient to make of psychiatry a profession so utterly humble as practically never to be heard from. At the very least, one would have supposed that psychiatrists would have been too chagrined to prescribe a course of action for society to follow in tackling its crime problem. Quite to the contrary, however, psychiatrists and those convinced by them have moved apace to put their views into effect on many fronts. Changes in the laws and certain court decisions have already been mentioned. All over the country, medically-oriented clinics, diagnostic centers, and residential treatment facilities are being established for delinquents and "emotionally disturbed children."[60] An administrator of the New York Department of Mental Hygiene has reported that large numbers of delinquent children are now being certified directly to institutions for the mentally ill in his state. He said that "the line between criminality and mental illness or mental defect is being redrawn."[61] The top administrator of the same department has commented that the psychiatrists have been "singularly successful with the courts," and, increasingly, offenders are being sent to "civil state hospitals instead of hospitals for the criminally insane."[62]

A well-known psychiatrist has revealed that in New York City, Puerto Rican

[52] Neustatter, *Psychiatry and Crime*, 170 PRACTITIONER 391 (1953).

[53] Banay, *Crime and Aftermath: Results of a Research on the Individual Offender*, in NAT'L PROBATION AND PAROLE ASS'N, 1948 YEARBOOK 35 (1949).

[54] Curran, *Specialized Techniques in the Treatment of Juvenile Delinquency*, 157 A.M.A.J. 108 (1955).

[55] *Juvenile Delinquency (Boston, Mass.), Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary*, 83d Cong., 2d Sess. 293 (1954).

[56] O. SPURGEON ENGLISH & GERALD H. J. PEARSON, EMOTIONAL PROBLEMS OF LIVING 290 (rev. ed. 1955).

[57] Bender, cited by Karpman, *Psychodynamics of Child Delinquency: Further Contributions*, 25 AM. J. ORTHOPSYCHIATRY 238, 274 (1955).

[58] Glueck, *supra* note 29, at 130-31.

[59] ROYAL COMM'N ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 359 (1949).

[60] The term "emotionally disturbed" is never operationally defined in the proposals to establish institutions to house children who are said to belong in that category.

[61] Hunt, *Mental Hygiene and Correction: An Operational Blueprint*, in PROCEEDINGS OF THE FREDERICK A. MORAN MEMORIAL INSTITUTE ON DELINQUENCY AND CRIME 21 (1953).

[62] Hoch, *The Changing Role of State Mental Hospitals*, in 1956 ANNUAL CONFERENCE OF THE MILBANK MEMORIAL FUND, PROGRAMS FOR COMMUNITY MENTAL HEALTH 149 (1957).

adolescents who become "emotionally disturbed" because of their difficult circumstances have been incorrectly diagnosed as mentally ill and have been wrongly committed to mental hospitals. He has insisted that, despite the fact that "judicial notice has been taken of such falsely committed cases," there has been no improvement in the situation.[63] Recently, a child guidance clinic made a special study of 500 cases referred to it. In only twenty-one per cent of these were the referrals regarded as unequivocally justified.[64] An examination of the reported behavior and problems on account of which these children were referred for diagnosis of their mental condition will show that the overwhelming majority were trivialities, universally found in children, and designated "normal" by many psychiatrists, even when manifested in marked degree.

Recently, a psychiatrist issued a very strong warning and protest that there has been an enormous increase in the diagnosis of schizophrenia among children. She pointed out that schizophrenia "is not a disease of childhood."[65] She gave illustrations of delinquents engaged in the customary types of gang activities who were wrongly given diagnoses of the more malignant mental diseases. She commented: "A child who commits a crime is now likely to be diagnosed schizophrenic and sent to a mental hospital."[66] She further pointed out that normal children were being committed to mental hospitals. Finally, she reported on a clinical re-evaluation of sixty children "in trouble for many different reasons" who were diagnosed as schizophrenic. It was found that the diagnosis was wrong in practically all cases.[67]

How can psychiatrists tell whether or not a delinquent or a criminal is mentally sick? Psychiatrists, like all other medical practitioners, presumably find this out by a process universally used in medicine—diagnosis. It would be sheer folly to disregard the clamorous insistence of psychiatrists that delinquency and crime are disease and that the offender is mentally sick, if for no reason other than the high authority from which it emanates. On the other hand, surely anyone would agree that it would be equal folly—it would be irresponsible—to encourage it, to advance it, to support it, to act on it, to incorporate it in court decisions and laws without a careful examination of the evidence. Therefore, the first step should be an appraisal of the scientific status of the process of diagnosis by which psychiatrists determine the mental condition of offenders.

III

THE RELIABILITY OF PSYCHIATRIC DIAGNOSIS

Generally, the specific technical diagnosis of an offender's mental condition is not in issue, as such, and does not concern the court or the correctional administrator. The court is interested in the consequences and implications of the defendant's

[63] FREDRIC WERTHAM, THE CIRCLE OF GUILT 134 (1956).

[64] FORREST N. ANDERSON & HELEN C. DEAN, SOME ASPECTS OF CHILD GUIDANCE CLINIC INTAKE POLICY AND PRACTICES 9 (1956).

[65] Mosse, *The Misuse of the Diagnosis Childhood Schizophrenia*, 114 AM. J. PSYCHIATRY 791 (1958).

[66] *Ibid.*

[67] *Ibid.*

mental condition, in so far as the law gives special effect to these in the judgment and disposition to be made, regardless of the specific diagnostic category. And the correctional administrator is concerned with decisions that can be altered in accordance with the psychiatric counsel he gets regarding the attributes and results thought to be associated with the various types of mental disorders afflicting his charges.

The psychiatrist himself, however, presumably thinks, as do all physicians, in terms of the specific diagnosis. Diagnosis is the process whereby the psychiatrist determines which one or more of the large variety of mental diseases and disorders a subject has. On the basis of the diagnosis, the psychiatrist comes to conclusions regarding the course, symptomatology, prognosis, malignancy, treatment, and other aspects of the subject's ailment that can help determine judicial and correctional decisions. All the decisions that can be affected by psychiatric judgment will ultimately rest on diagnosis, which is the basic instrumentality of medical practice.

A striking example of the importance of diagnosis and of how a specific diagnostic category can have crucial bearing on the disposition of offenders is provided by a recent occurrence. It has been reported that in a certain jurisdiction, the staff of a mental hospital that has been customarily testifying that psychopathic or sociopathic personality is not a mental disease formally announced that henceforth it would testify that this condition does constitute a mental disease.[68] Other psychiatrists, in and outside of hospitals, in this and in other jurisdictions, do not share the view and would not testify that the condition in question is a mental disease. Thus, the fate—execution, or acquittal on the grounds of insanity—of a murderer, say, can depend in the final analysis on a specific diagnosis and on the value judgment of psychiatrists regarding that diagnosis.

Take, as another example, the question of the malignancy of the various mental diseases. The malignancy ascribed to an offender's mental disease can certainly have a bearing on decisions made about him. It can, in the case of a sex offender, for instance, figure in the determination as to when to release him, if ever. Again, it depends upon the philosophy of psychiatrists whether a mental disease is benign or malignant, and this philosophy differs markedly among different psychiatrists. Take the psychoneuroses, for example. One practitioner describes them as a "relatively benign group of personality disturbances . . . ,"[69] while another reports that "some authorities regard the psychoneuroses as the most serious disease threat of modern civilization."[70]

If so much can depend on psychiatric diagnosis, the question can be raised: How reliable is it?[71] Surely the courts, the correctional administrators, and the welfare

[68] *In re* Rosenfeld, 157 F. Supp. 18 (D.D.C. 1957).

[69] ARTHUR P. NOYES, MODERN CLINICAL PSYCHIATRY 445 (4th ed. 1953).

[70] EDWARD A. STRECKER, FUNDAMENTALS OF PSYCHIATRY 38 (5th ed. 1952).

[71] Many persons do not understand the meaning of the concept of reliability in scientific methodology. Reliability means agreement by the experts on their theories, observations, and conclusions—agreement not by fiat, but by scientific demonstration of the correctness of any particular proposition. To the extent that a discipline is scientifically established, a question regarding any particular aspect of its subject matter will yield essentially the same answer from all experts. If the same question brings forth widely divergent responses, then it should be clear that the point involved has not been scientifically established.

officials must be assuming that psychiatric diagnoses have adequate reliability. It is inconceivable that they would embrace psychiatry unless they were convinced that the judgments, diagnoses, and conclusions of its practitioners are reliable.

The literature of the forensic psychiatrists often sets forth implicit and explicit persuasions that psychiatric diagnoses are as reliable as those of any other branch of medicine. Zilboorg, for example, writes: "The clinical judgment of the psychiatrist—provided he be properly qualified—must be accepted by the courts to the same extent as the clinical judgment of a surgeon or an internist."[72] More than one psychiatrist has expressed resentment at the proclivity of some observers to raise questions about psychiatric diagnoses and judgments. One of these has called for what looks like unquestioning acceptance of these judgments:[73]

> If society sees fit to appoint neutral experts to determine the sanity of the defendant, then society should demonstrate its faith in these experts and abide fully by their findings. This [apparently referring to noncompliance with psychiatric findings] is tantamount to calling in a physician for a serious medical illness and then not following his advice.

Assurance has been given that "psychiatry has its nosology just as do the other branches of medicine. Psychiatric clinical entities are as discrete as the cardiac or the pulmonary disorders."[74] Statements like the following are often encountered: "Modern psychiatric diagnoses . . . in acute and chronic mental disorders, are as accurate as those in tuberculosis, communicable disease, or other illness."[75]

Time and again, in the face of overwhelming evidence to the contrary, psychiatrists have dismissed as baseless the charge that they are frequently in disagreement about their diagnoses, observations, and theories. They insist that they are in agreement on most issues. Overholser makes a daring misrepresentation on this point, typical of many others that could be cited:[76]

> There is general agreement among psychiatrists upon the essential facts and the significance of words and actions, although there are minor differences in theory. The differences and disagreements are much exaggerated by the critics, and constitute one of the allleged reasons for the reluctance of the legal profession to accept any more readily than they do psychiatric concepts and teachings.

If one turns from these writings of the forensic psychiatrists to the writings of leading psychiatrists who have no special interest in forensic work; who address themselves to the problem of diagnosis as a scientific issue to be solved by research; who do not spend an inordinate amount of time haranguing and harassing the legal

[72] Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331, 335 (1955).

[73] *Mental Disorder and Criminal Responsibility: A Symposium*, 3 J. SOC. THERAPY 66, 87-88 (1957). In referring to "neutral experts," this psychiatrist apparently has in mind those jurisdictions and situations in which the expert does not appear as a partisan for the defense or for the prosecution.

[74] GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 27. Guttmacher has elsewhere taken a different position: "Psychiatric nosology is, at best, an unsatisfactory business. . . ." See MANFRED S. GUTTMACHER, SEX OFFENSES 102 (1951).

[75] A. E. BENNETT, EUGENE HARGROVE, & BERNICE ENGLE, THE PRACTICE OF PSYCHIATRY IN GENERAL HOSPITALS 91 (1956).

[76] WINFRED OVERHOLSER, THE PSYCHIATRIST AND THE LAW 23 (1953).

profession; who are not busily engaged in fighting for changes in the laws which would bring them into greater conformity with their own value position; who do not seize upon every writing and speaking engagement as an opportunity to seduce judges and others about the present status of psychiatric knowledge; who do not pout that the court psychiatrist has as much right as the prosecutor and defense counsel to be heard as to the disposition of defendants;[77] and who, in other ways, are not clamoring to enhance their power to control and decide the destiny of offenders, one gets an entirely different picture of the state of psychiatric diagnosis. As a matter of fact, one arrives at the unmistakable conclusion that psychiatric diagnosis is grossly unreliable, is beset by numerous unsolved complexities, and is, in fact, in a state of chaos.

Take, for example, the report of the 1951 annual meeting of the American Psychopathological Association.[78] This meeting was devoted to the topic of psychiatric diagnosis and was only incidentally concerned with forensic matters. By culling certain statements from the report of this meeting, it is possible to show that some psychiatrists' appraisals of the reliability of diagnosis and of the competence of psychiatric research is in striking contrast to the samples of exaggerated claims set forth above. Disregarding the specific authorship of the statements, it was submitted at this meeting that the concept of psychosis is not "definable"[79] and is so fallacious as to have "facilitated loose and unscientific thinking" in psychiatry;[80] that the term schizophrenia means many different things to different people;[81] that "it is hardly necessary to stress the extent to which there is confusion in regard to the diagnosis at the present time";[82] that because there is no agreement on psychodynamics among the different schools of thought at present, "we encounter a complete confusion" in diagnosis;[83] that "the personality and biases of the psychiatrist may also influence his choice of a diagnostic label";[84] that because there is "looseness and ambiguity" in the terms used by psychiatrists, progress in diagnosis and treatment is retarded;[85] that "the psychiatric literature is replete with dissensions and controversies" even on "elementary problems";[86] that diagnosis in child psychiatry "has literally been a 'Tower of Babel' ";[87] that in the military situation, psychiatrists may deliberately make invalid diagnoses in order to comply with administrative exigencies rather than medical dictates;[88] that the extent of agreement among psychiatrists on specific diagnoses was found through research to be "neither satisfactory nor desirable";[89] that an examination of researches reported in the issues of eleven psychiatric and related journals over a two-year period showed grave defects and serious lack of

[77] Guttmacher, *Adult Court Psychiatric Clinics*, in UNIVERSITY OF COLORADO CONFERENCE ON CRIME, CRIMES OF VIOLENCE 51 (1950).

[78] PAUL H. HOCH & JOSEPH ZUBIN (EDS.), CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS (1953).

[79] *Id.* at 25.
[80] *Id.* at 31.
[81] *Id.* at 180.
[82] *Id.* at 41.
[83] *Id.* at 50.
[84] *Id.* at 108-09.
[85] *Id.* at 267.
[86] *Id.* at 231.
[87] *Id.* at 220.
[88] *Id.* at 55.
[89] *Id.* at 60.

sophistication in experimental methodology;[90] that psychiatric research is hampered by "an almost total lack of training in terms of scientific disciplines."[91]

It must not be supposed that such strictures are confined to this one report. Far from it; for, although one could never get a true picture of the situation by reading only the highly deceptive literature of the forensic psychiatrists, the unreliability of psychiatric diagnosis is a widely-documented fact. Ironically enough, on the very eve of the *Durham* decision, no less a source than the *American Journal of Psychiatry* editorially took to task those psychiatrists who were attacking the existing rules and laws of criminal responsibility and urging their abrogation. The editorial took the position that these psychiatrists had not presented convincing evidence that psychiatry had made the advances claimed by them and on the basis of which they were demanding changes in the laws.[92] The editorial further reminded these doughty fighters that medical experts do not agree even "as to the diagnosis of textbook types of insanity."[93]

Even more recently, a psychiatrist cautioned: "Diagnostic judgments are currently so invalid and unreliable that little weight should be attached to them."[94] And more recently still, Mosse, who has already been cited as expressing alarm at the increasing tendency for psychiatrists readily and wrongly to diagnose delinquents as schizophrenic, stated: "No valid classification of mental diseases in children has yet been worked out. . . ."[95] Further, she explained: "One of the most important gaps in our knowledge is that the limits of normal for children of different ages have not yet been established,"[96] a view shared by other cautious clinicians. It might be interesting to select the final example from a context as far removed as possible from any immediate forensic concern. A psychiatrist who has done research on the relationship between peptic ulcer and mental disorder has observed that one of the difficulties in such research is the "unreliability of psychiatric diagnosis." He also commented that even the same clinicians are inconsistent with themselves.[97]

Psychiatrists have sought to convince lawyers, correctional administrators, and others not only that their diagnoses are as reliable as those of other branches of medicine, but also that they, like other medical practitioners, have reliable and valid tools, devices, tests, and procedures to augment and confirm their clinical diagnoses and impressions. For example, one psychiatrist has said: "Just as the medical person uses x-ray and laboratory tests in making a physical diagnosis, so are there similar routines to determine the personality structure."[98] A leading forensic psychiatrist has maintained that psychiatrists have "certain physical and psychological tests and

[90] *Id.* at 20.
[91] *Id.* at 20.
[92] *Criminal Irresponsibility*, 110 AM. J. PSYCHIATRY 627, 628 (1954).
[93] *Ibid.*
[94] Thorne, *Psychiatric Responsibilities in the Adminstration of Criminal Justice*, 2 ARCH. CRIM. PSYCHODYN. 226, 236 (1957).
[95] Mosse, *supra* note 65, at 791.
[96] *Id.* at 793.
[97] Gosling, *Peptic Ulcer and Mental Disorder—II*, 2 J. PSYCHOM. RES. 285 (1958).
[98] MARIE NYSWANDER, THE DRUG ADDICT AS A PATIENT 58 (1956).

well recognized constellations of symptoms, to help guide us in our judgments."[99]

As in regard to the contention about reliability, so in regard to this contention, these writers rarely spoil their positive declarations by referring to quite a different kind of observation that has been made by psychiatrists and other experts about their diagnostic instruments. A psychiatrist in the College of Physicians and Surgeons of Columbia University, for example, has considered the matter of diagnosis and diagnostic tools. He comes to a conclusion that is diametrically opposed to the ones cited. He holds that in contrast to the physical diseases, the existence of which can be determined on the basis of "a recognizable syndrome" and by the use of certain devices and tests, "in emotional and mental illnesses this is almost never the case; even in the so-called major mental and emotional illnesses, such guides to detection and diagnosis are almost entirely lacking."[100] To cite another example, the New York State Commissioner of Mental Hygiene recently said:[101]

> While other fields of medicine often can augment or even verify clinical diagnoses by other methods—by tests that are independent of the clinical appraisal of the patient—this is generally not true in psychiatry. Although I am fully aware of the claims that it can be done, I maintain that it cannot.

Most of the time, there is particular praise for the Rorschach test. One gets the impression that it is regarded by psychiatrists as the most powerful tool at their disposal and one which goes a long way in putting psychiatry on a par with any other medical specialty. Strecker, for example, appearing for the defense in a murder trial in which the life of the defendant was at stake, testified:[102]

> I regard the Rorschach test as very scientific, well-tried, in common use in all good mental hospitals, relied on by the majority of psychiatrists I know, and in my opinion the interpretation has been in agreement with my own opinion and diagnosis in more than 95% of the cases.

Wertham has stated, "The Rorschach Test is a valid scientific method."[103] Banay has extolled the Rorschach test.[104] Guttmacher has claimed that the Rorschach test can be "amazingly revealing."[105] Elsewhere, he and a lawyer, writing jointly, say that "definite diagnostic criteria have been established" for it. They are astounded by "how much a skillful Rorschach technician can tell about a patient that he has never seen, merely from analyzing his test responses."[106]

[99] Guttmacher, *Criminal Responsibility in Certain Homicide Cases Involving Family Members*, in PAUL H. HOCH & JOSEPH ZUBIN (EDS.), PSYCHIATRY AND THE LAW 74 (1955).

[100] Ginsburg, *The Neuroses*, 286 ANNALS 55 (1953).

[101] Hoch, *The Etiology and Epidemiology of Schizophrenia*, 47 AM. J. PUB. HEALTH 1071 (1957).

[102] RICHARD GEHMAN, A MURDER IN PARADISE 137 (rev. ed. 1956). Dr. Strecker did not reveal whether his own diagnoses were checked for reliability in any way other than by their agreement with the Rorschach test. If diagnoses yielded by the Rorschach test are unreliable and Dr. Strecker's diagnoses are in agreement with them, then Dr. Strecker's diagnoses have to be unreliable. As will be noted shortly, the Rorschach test has been found by some experts to be grossly unreliable.

[103] FREDRIC WERTHAM, SEDUCTION OF THE INNOCENT 56 (1954).

[104] Banay, *Applications of Clinical Psychology to Crime and Delinquency*, in 1 DANIEL BROWER & LAWRENCE E. ABT (EDS.), PROGRESS IN CLINICAL PSYCHOLOGY 459, 463 (1952).

[105] MANFRED S. GUTTMACHER, SEX OFFENSES 31 (1951).

[106] GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 22.

All these misleading effusions fail even to refer to another side of the story. The other side of the story is provided by the experimental researches, theoretical analyses, and methodological observations that have demonstrated the unreliability, invalidity, subjectivity, theoretical weaknesses, illogicalities, and questionable premises of the Rorschach test. It is these considerations that led a psychologist, who is an expert on the construction and validation of personality tests, to conclude that the results secured through the Rorschach test are not superior to the results that would be secured by writing the different diagnoses on the faces of a die and then casting the die to determine the personality of a subject.[107] It is a review of some of these researches and judgments, which need not be repeated here, that also led the present writer to conclude elewhere: ". . . [T]he results of the Rorschach test should not be used as a basis for reaching decisions about people and they should not be allowed to enter in any serious way into deliberations looking toward the disposition of cases."[108] Testimony regarding a defendant's personality and mental condition which is based in whole or in part on the Rorschach test should certainly not be allowed in court.

The gross unreliability of psychiatric diagnosis—which, in the courts, takes the form of the so-called battle of the experts—has been one of the most painfully embarrassing ordeals for forensic psychiatrists. Indeed, it is one of the leading concerns of the psychiatric profession as a whole that it is in connection with forensic work that the unreliability of diagnosis comes in for the greatest amount of public scrutiny, keeps psychiatry in disrepute with those who have sufficient scientific sophistication to understand its implications, and provides merriment for people. Psychiatrists have tried by every possible means to escape this morass. They have denied the importance of diagnosis. They have even disparaged diagnosis. They have said that a diagnosis is a triviality that cannot encompass the actual object of psychiatric study—"the whole man." But the study of the whole man is philosophy, not medicine. In any event, psychiatrists of this persuasion have been confronted by powerful and even angry reminders from colleagues that if they claim to be physicians, then they must diagnose. They are told that proper treatment depends on it, prognosis depends on it, scientific progress depends on it. The *American Journal of Psychiatry* has issued the following editorial warning on the matter: ". . . [I]n psychiatry, as well as in all medical disciplines, accurate diagnosis is the keystone of appropriate treatment and competent prognosis."[109] A textbook has taken this firm stand: "The contemptuous attitude toward diagnosis, which is so prominent a feature of many contemporary schools [of psychiatry], runs counter to the entire spirit of medicine."[110] One psychiatrist put it very bluntly:[111]

[107] H. J. EYSENCK, SENSE AND NONSENSE IN PSYCHOLOGY 221 (1957).

[108] Hakeem, *A Critique of the Psychiatric Approach to the Prevention of Juvenile Delinquency*, 5 SOC. PROB. 194, 196-97 (1958).

[109] *The New Nomenclature*, 109 AM. J. PSYCHIATRY 548 (1953).

[110] W. MAYER-GROSS, ELIOT SLATER, & MARTIN ROTH, CLINICAL PSYCHIATRY 6 (1954).

[111] Pasamanick, *Patterns of Research in Mental Hygiene*, 26 PSYCHIATRIC Q. 577, 578 (1952).

With really unpardonable ignorance, it is stated by some psychiatrists that the diagnosis of a psychiatric entity is unimportant and that the so-called psychodynamics are the essential object of study. This would be partially excusable, only if they could give the dynamics in more than hypothetical formulation. Such statements display a lamentable lack of insight into the essentials of scientific procedure and do not speak happily for the future of research in the field.

Some psychiatrists have taken refuge from diagnosis by giving a description of personality instead. But Ackerman, as do others, objects to this and points out that what goes into such a description is "too largely determined by subjective emphases in a particular examiner's mind."[112] This, of course, is only another way of saying that descriptions of personality can be as unreliable as diagnostic categorization.

In desperation, forensic psychiatrists have turned to the legal profession for help. They have proposed and vigorously advocated various legal changes the effect of which would be to conceal diagnostic unreliability or to make the diagnosis less accessible to attack. Probably the greatest favor that judges, lawyers, and legislators can do for the profession of psychiatry is to implement its plans to eliminate the "battle of the experts" and to render the psychiatrist's diagnosis unchallengeable. The relentless attempts of the psychiatrists to bring these changes about and the increasing tendency of the legal profession to yield to their entreaties need not be detailed here, since these issues are the subject of a forthcoming paper by the writer. For now, it need only be noted that psychiatrists have insisted that somehow, sometime, the lawyers must find ways to extricate the profession of psychiatry from a very embarrassing state of affairs.

It might be argued that the unreliability of psychiatric diagnoses and judgments is flagrantly evident in the psychiatric literature and cannot be concealed. But the availability of evidence has made no difference to those judges and lawyers who are making momentous decisions and recommendations hospitable to psychiatry.

Furthermore, some judges are not disturbed by the disagreements of physicians. One of these is Judge John Biggs, Jr. He is Chief Judge of the Third Judicial Circuit of the United States. Judge Biggs has been very friendly to psychiatry. His opinions reflect the kind of views whose adoption psychiatrists have been urging. These opinions have been widely cited and hailed by psychiatrists. The American Psychiatric Association bestowed the Isaac Ray Award upon Judge Biggs. This is given annually to a member either of the legal or of the psychiatric profession who has contributed notably to the improvement of the relations between psychiatry and the law. As part of the award, Judge Biggs received one thousand dollars. As another part, he had the privilege of giving a series of lectures on forensic psychiatry at a university of his choice. These lectures have been published in a book.[113] An examination of the notes in this book reveals that it contains almost no citations

[112] Ackerman, *Psychiatric Disorders in Children—Diagnosis and Etiology in Our Time*, in PAUL H. HOCH & JOSEPH ZUBIN (EDS.), CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS 221 (1953).

[113] JOHN BIGGS, JR., THE GUILTY MIND (1955).

of psychiatric literature. In the rare instances when such citations do occur in the book, they refer to the propagandistic literature the nature of which has been discussed more than once in this paper. Judge Biggs has said, "Let me make it clear that I am not objecting to even skillful physicians differing in their diagnoses." He further commented, "Heaven knows they differ less than lawyers and judges,"[114] thus overlooking the fundamental differences between medicine and law, the serious implications of the disagreements of physicians, the distinction between scientific questions and value judgments, the fact that the social judgments of psychiatrists are being mistaken by themselves and others for medical judgments, and the methodological and philosophical reasons why it is perfectly legitimate for judges and lawyers to disagree but not permissible for psychiatrists to do so.

It has been seen that psychiatric diagnoses are grossly unreliable. But psychiatrists do diagnose. In the courts, to repeat a point, life or death can depend upon their diagnoses. It is important, therefore, to look into the nature of those diseases and other mental infirmities which psychiatrists diagnose in offenders. Obviously, it will not be possible to discuss all such diseases. Therefore, the two most important ones have been selected for consideration: psychopathic personality and psychoneurosis.

IV

PSYCHOPATHIC PERSONALITY

Probably the mental condition most often discussed in connection with delinquency and crime is "psychopathic personality" or "psychopathy."[115] One investigator has listed 202 terms used as equivalents of these,[116] but even this list does not exhaust the number. In 1952, the American Psychiatric Association adopted the new term, "sociopathic personality," for this condition.[117] Since then, the old term continues to be the more widely-used one. The old term and its derivative forms will be used here for convenience.

[114] Biggs, *The Lawyer Looks at the Doctor*, 28 DEL. STATE MED. J. 122, 125 (1956).

[115] The words "psychopathic" and "psychopathy" used in the present context should not be confused with one of their dictionary definitions—namely, a generic term meaning mental disorder. "Psychopathic personality" or "psychopathy" is used by psychiatrists to designate a type of mental disease.

Recently, Dr. Albert H. Arenowitz, a juvenile court psychiatrist, speaking before the Ross Club of the University of Wisconsin, misinformed a large audience that the concept of psychopathic personality was no longer used, having been discarded by psychiatrists many years ago. In the few months before and after this disavowal of the concept, a large number of books and many dozens of articles devoted in whole or in part to psychopathic personality were published. The concept has been and is now one of the most important in psychiatry and the most important in forensic psychiatry. Under its newer name, "sociopathic personality," this is the diagnosis a psychiatrist applied to Charles Starkweather in the course of his widely-publicized trial in Lincoln, Nebraska, in May 1958, for one of the eleven murders he admittedly committed.

[116] Cason, *The Psychopath and the Psychopathic*, 4 J. CRIM. PSYCHOPATH. 522 (1943).

[117] The change in terminology has not resulted in any other changes in the concept. Discussions on "sociopathic personality" are identical to discussions on "psychopathic personality." Often, authors using the new term explicitly state that they mean by sociopathic personality what was meant by the old term psychopathic personality.

Without exception, on every point regarding psychopathic personality, psychiatrists present varying or contradictory views. There is danger that such a statement will be mistaken for hyperbolic emphasis. Therefore, it should be explicitly made clear that the statement is meant to be taken literally. Not all points can be illustrated here, but a few will be presented, remembering that whenever one authority is cited, dozens of others taking a like position on the point in question could be cited.

Psychiatrists are in disagreement on whether they are in agreement or in disagreement on the subject. One investigator questioned seventy-five authorities, sixty-four of whom were psychiatrists, on how much agreement exists among psychiatrists on the concept of sexual psychopathy. Forty-two replied that there is no substantial agreement and twenty-four that there is.[118] Campbell is surprised at "how much conformity exists in the minds of practicing psychiatrists concerning psychopathic personality";[119] Wilson and Pescor, on the other hand, say that "practically every psychiatrist has his own idea of what constitutes a psychopathic personality. . . ."[120] Cleckley, intending to show that great unanimity exists regarding this concept, says: "If a psychiatrist, in speaking to another about a patient, uses the term *psychopath,* there is seldom any misunderstanding as to the sort of patient in question";[121] but Duval states: ". . . [A]ctually I am not sure whether we know what we are talking about when we speak of the psychopath. . . ."[122] Thompson attributes the great amount of agreement among psychiatrists on the concept of psychopathy to the fact that it "is such a well-defined entity that its symptoms and characteristics are as well known to the psychiatrist as the symptoms of measles are known to the pediatrician";[123] but this is countered by Kennard's observation: "Clinicians do not even agree, actually, as to whether such a category exists."[124] Overholser and Richmond express the view that "there is no general agreement among psychiatrists as to what type of personality should be designated psychopathic,"[125] only to be contradicted by Guttmacher and Weihofen, who say that while opinion about psychopathy is not unanimous, "there is considerable agreement."[126] Lowrey, referring to the diagnosis of psychopathic personality, thinks that "the important point is that psychiatrists agree there is such a group of abnormal personalities . . .";[127] while Stevenson, writing about the same concept, puts the issue

[118] PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER 57 (1950).

[119] JOHN D. CAMPBELL, EVERYDAY PSYCHIATRY 67 (2d ed. 1949).

[120] J. G. WILSON & M. J. PESCOR, PROBLEMS IN PRISON PSYCHIATRY 134 (1939).

[121] Cleckley, *The Psychopath Viewed Practically,* in ROBERT M. LINDNER & ROBERT V. SELIGER (EDS.), HANDBOOK OF CORRECTIONAL PSYCHOLOGY 395 (1947).

[122] DANIEL BLAIN (ED.), STEPS FORWARD IN MENTAL HOSPITALS 178 (1953).

[123] GEORGE N. THOMPSON, THE PSYCHOPATHIC DELINQUENT AND CRIMINAL 39 (1953).

[124] Kennard, in discussion of Hill, *EEG in Episodic, Psychotic and Psychopathic Behaviour: A Classification of Data,* 4 ELECTROENCEPH. & CLIN. NEUROPHYS. 419, 440 (1952).

[125] WINFRED OVERHOLSER & WINIFRED V. RICHMOND, HANDBOOK OF PSYCHIATRY 184 (1947).

[126] GUTTMACHER & WEIHOFEN, *op. cit. supra* note 2, at 88.

[127] LAWSON G. LOWREY, PSYCHIATRY FOR SOCIAL WORKERS 260 (2d ed. 1950).

as follows: "There is much disagreement as to the validity of this category as a diagnosis."[128]

Is psychopathic personality a clinical entity? There are contradictory views on this question, varying from those who, after extensive study of the matter, hold that it is "a very definite clinical entity"[129] to those who, after extensive study of the matter, hold that "there is no such entity."[130] Is psychopathic personality a serious condition? Every conceivable shade of opinion is espoused. Wertham is satisfied, as are other clinicians, that psychopathy is a "mild kind of abnormality not gross enough to be called a mental disease"[131] or to be regarded as a "psychosis."[132] But Thorne is satisfied that it is just as malignant as a psychosis;[133] Carroll explicitly states that it is a "mental disease";[134] and Darling and Sanddal say it is a "psychosis."[135]

How frequently is psychopathic personality found among offenders? It depends entirely on which psychiatrist is asked, because estimates of the proportion of criminals who are psychopaths and the proportion of psychopaths who are criminals vary from 0 to 100 per cent. One psychiatrist holds that the criminal is "rarely" psychopathic.[136] Another claims that criminals are "usually" psychopathic.[137] Two others insist that all psychopathic personalities are pathological criminals.[138] Another counters that many psychopaths are not criminals.[139] One goes so far as to reveal that he has seen "as many psychopathic judges, lawyers, police officers, and psychiatrists as psychopathic criminals."[140] A reception center of a state prison system has reported that only 2.3 per cent of prisoners admitted in a twelve-year period were diagnosed as psychopaths by psychiatrists.[141] Three psychiatrists speculate that about five per cent of convicted prisoners may be psychopathic.[142] Two others found fourteen per cent of prisoners psychopathic.[143] Another holds that one-fourth to one-half of all criminals are psychopathic.[144] Three others are convinced that three-

[128] GEORGE S. STEVENSON, MENTAL HEALTH PLANNING FOR SOCIAL ACTION 144 (1956).
[129] HERVEY CLECKLEY, THE MASK OF SANITY 210 (3d ed. 1955).
[130] Abrahamsen, *Study of 102 Sex Offenders at Sing Sing*, Fed. Prob., Sept. 1950, pp. 26, 27.
[131] FREDRIC WERTHAM, THE SHOW OF VIOLENCE 85 (1949).
[132] *Id.* at 128.
[133] Thorne, *supra* note 94, at 235.
[134] ROYAL COMM'N ON CAPITAL PUNISHMENT, *op. cit. supra* note 59, at 551.
[135] Darling & Sanddal, *A Psychopathologic Concept of Psychopathic Personality*, 13 J. CLIN. & EXPER. PSYCHOPATH. 175, 178 (1952).
[136] Hulbert, *Constitutional Psychopathic Inferiority in Relation to Delinquency*, 30 J. CRIM. L. & CRIMINOLOGY 3, 11 (1939).
[137] C. S. BLUEMEL, THE TROUBLED MIND 491 (1938).
[138] J. M. NIELSEN & GEORGE N. THOMPSON, THE ENGRAMMES OF PSYCHIATRY 190 (1947).
[139] LOWREY, *op. cit. supra* note 127, at 267.
[140] ABRAHAM MYERSON, SPEAKING OF MAN 185 (1950).
[141] Pennington, *Psychopathic and Criminal Behavior*, in L. A. PENNINGTON & IRWIN A. BERG (EDS.), INTRODUCTION TO CLINICAL PSYCHOLOGY 424 (2d ed. 1954).
[142] Stafford-Clark, Pond, & Doust, *The Psychopath in Prison: A Preliminary Report of a Co-Operative Research*, 2 BRIT. J. DELINQ. 117, 127 (1951).
[143] WILSON & PESCOR, *op. cit. supra* note 120, at 134.
[144] KARL A. MENNINGER, THE HUMAN MIND, 158 (3d ed. 1945).

fourths of prisoners under twenty-one years of age are psychopaths.[145] Another testifies that ninety per cent or more of incarcerated delinquents are potential, if not actual, psychopaths.[146]

What types of crimes do psychopaths commit? No one answer can be given, seeing that different psychiatrists take entirely different positions. One has said that psychopaths "are driven . . . to deeds of violence which are as uncontrollable as a tidal wave."[147] Two others, not even mentioning violence, have stated that the antisocial behavior of psychopaths "consists of every form of petty misdemeanor."[148] Another has explained that a "common feature" of the psychopath is the commission of serious crimes of violence.[149] This is contradicted by the opinion of another, who has concluded that the crimes of psychopaths "generally . . . are not in the category of major crimes."[150] Two psychiatrists have asserted that "crimes of violence such as assault, rape and murder . . . are typical acts of psychopathic criminals,"[151] but this is opposed by the view of another, who has said that the typical psychopath is not likely to commit "major" crimes.[152] One psychiatrist, medically describing the psychopath as an "incorrigible monster,"[153] makes this alarming, and at the same time comforting, observation: "We can thank heaven that the type is rare because the offenses within the range of the genuine psychopath are without limits." "They will," says he, without giving a shred of evidence, "commit profit murder for a sum as low as twenty-five dollars."[154] There is more reassurance in the observation of another psychiatrist, who, while he presents no evidence either, holds that the crimes of the psychopath are "usually . . . relatively minor."[155] In a widely-used textbook, three psychiatrists, who are apparently disinclined to get embroiled in these dizzying controversies, have taken refuge in the following sweeping position about the psychopath's behavior: "The behavior of these patients may vary from amiable lying to criminal activity."[156]

What causes psychopathic personality? No single answer would do justice to the large array of factors implicated by different psychiatrists in the causation of this malady. There is no disease like psychopathy in the whole realm of medicine. It is the only disease known for which some practitioners blame conditions in the home and some, conditions in the central nervous system. Birnbaum finds that

[145] Haugen, Coen, & Dickel, *supra* note 47, at 85.

[146] ROYAL COMM'N ON THE LAWS RELATING TO MENTAL ILLNESS AND MENTAL DEFICIENCY, MINUTES OF EVIDENCE 943 (1954).

[147] ROYAL COMM'N ON CAPITAL PUNISHMENT, *op. cit. supra* note 59, at 462.

[148] LOUIS J. KARNOSH & EDWARD M. ZUCKER, A HANDBOOK OF PSYCHIATRY 206 (1945).

[149] ROYAL COMM'N ON CAPITAL PUNISHMENT, *op. cit. supra* note 59, at 491.

[150] EDWARD A. STRECKER, BASIC PSYCHIATRY 299 (1952).

[151] NIELSON & THOMPSON, *op. cit. supra* note 138, at 191.

[152] HERVEY CLECKLEY, THE MASK OF SANITY 37 (3d ed. 1955).

[153] DAVID ABRAHAMSEN, WHO ARE THE GUILTY? 212 (1952).

[154] *Id.* at 161.

[155] Tarumianz, *New State Facilities for Criminally Inclined Psychopaths in Delaware*, 22 DEL. STATE MED. J. 163, 165 (1950).

[156] JACK R. EWALT, EDWARD A. STRECKER, & FRANKLIN G. EBAUGH, PRACTICAL CLINICAL PSYCHIATRY 258 (8th ed. 1957).

psychopathy is "constitutional; that is innate and (probably) hereditary";[157] Bender, that it is the purest example of "psychogenic or environmentally determined behavior disorders . . .";[158] Lichtenstein and Small, that in many cases, it is directly attributable to endocrine dysfunction;[159] Greenacre, that it is due to poor parent-child relations;[160] Nielsen and Thompson, that cerebral trauma is the commonest cause;[161] O'Conner, that deprivation of "blood-sugar" has been implicated;[162] and Palmer, that "deprivation of Mother Love" is the basic factor.[163] Two distinguished experts on psychopathy caution that different factors can cause this disease in different patients. They hold that in some cases, the predominating cause will be such factors as poverty, a broken home, and so on; and in other cases, "disturbance of the prefrontal hypothalamic connections," brain injury, and the like.[164] Finally, with refreshing simplicity, one psychiatrist suggests, in effect, that psychopathic personality results from the failure to train the child to behave himself.[165]

What do psychiatrists say about treatment of psychopaths? Everything, for viewpoints on the treatment of this disease vary markedly from psychiatrist to psychiatrist. Asked by the Royal Commission on Capital Punishment whether any progress had been made toward curing psychopaths, one expert answered, "I am afraid not."[166] A different psychiatrist, answering the same question submitted by the same Commission, said that the curability of the psychopath is "surprisingly large."[167] When it comes to specific treatments that have been proposed or tried, there is rampant diversity. They run the gamut from attempts to incorporate the subject into groups having athletic, cultural, political, or religious interests,[168] to brain surgery.[169] One intriguing type of treatment has been reported in which "the psychopathic delinquent is brought before an awesome *panel* of doctors who literally say *nothing* beyond an initial expression of their desire to help the culprit once he is honestly interested in helping himself." The hazards of this approach are tremendous, judging from one observation that has been made: ". . . [T]he psychopath can sit out the doctors easily enough."[170]

Psychiatrists do not disagree only with each other. Some disagree with themselves. Often it is possible to find one and the same psychiatrist taking contradictory

[157] Birnbaum, *A Court Psychiatrist's View of Juvenile Delinquents*, 261 ANNALS 55, 59 (1949).
[158] LAURETTA BENDER, AGGRESSION, HOSTILITY AND ANXIETY IN CHILDREN 152 (1953).
[159] P. M. LICHTENSTEIN & S. M. SMALL, A HANDBOOK OF PSYCHIATRY 88 (1943).
[160] Greenacre, *Problems of Patient-Therapist Relationship in the Treatment of Psychopaths*, in LINDNER & SELIGER, *op. cit. supra* note 121, at 379.
[161] NIELSEN & THOMPSON, *op. cit. supra* note 138, at 169.
[162] WILLIAM A. O'CONNOR, PSYCHIATRY 304 (1948).
[163] HAROLD PALMER, PSYCHOPATHIC PERSONALITIES 12 (1957).
[164] DAVID HENDERSON & R. D. GILLESPIE (WITH IVOR R. C. BATCHELOR), A TEXT-BOOK OF PSYCHIATRY 388 (8th ed. 1956).
[165] Wooley, *A Dynamic Approach to Psychopathic Personality*, 35 SO. MED. J. 926 (1942).
[166] ROYAL COMM'N ON CAPITAL PUNISHMENT, *op. cit. supra* note 59, at 307.
[167] *Id.* at 501.
[168] OSKAR DIETHELM, TREATMENT IN PSYCHIATRY 426 (2d ed. 1950).
[169] Darling & Sanddal, *supra* note 135, at 179.
[170] RUTH L. MUNROE, SCHOOLS OF PSYCHOANALYTIC THOUGHT 293 (1955).

stands on the same question from publication to publication, on different pages of the same publication, and on the same page of the same publication. For example, Banay, a psychiatric consultant to the Federal Bureau of Prisons, has taken curious positions on the psychopath. In a conference on criminal responsibility held in early 1957, he rejected the concept of psychopathic personality, saying: "I am very much in disagreement with the diagnosis of psychopath. Psychopath means we don't know what is wrong with him."[171] Just about the time Banay was making this statement, a book written by him was published. In this book, he describes in detail a treatment for psychopaths:[172]

> Marked success in the treatment of some psychopaths has been obtained through a combination of electrocoma and psychotherapy. The treatment requires hospitalization for eight months to a year and it consists of a series of electrocoma treatments followed by analytically oriented psychotherapy. This is followed by further ambulatory treatment under therapeutic conditions. The procedure has been tested sufficiently to show that many aggressive psychopaths can be guided to adequate social adjustment, over-all change of temperamental trends and freedom from criminal inclinations.

Banay is prescribing drastic and lengthy "therapy" for a diagnostic category he rejects.

Guttmacher took the position in 1951 that "the diagnosis of a psychopathic personality is practically meaningless." He elaborated on the point by urging that the term be discarded or restricted to a type of case described by Cleckley.[173] But in the 1951 annual report of the court clinic of which Guttmacher is Chief Medical Officer, it is recorded that forty-eight cases were diagnosed as psychopaths of a type other than that described by Cleckley.[174] Furthermore, in his memorandum to the American Law Institute, Guttmacher raises no question whatever about the validity of the diagnosis of psychopathic personality, and, in fact, he favors the institutionalization of psychopaths for an indeterminate period.[175] Guttmacher's clinic is attaching to offenders a diagnosis which he admits is practically meaningless. And, in one place, he is recommending possible lifelong custody for offenders who are diagnosed as having a disease which, in another place, he says is practically meaningless.

McCarthy and Corrin state that the psychopath "is within normal limits intellectually . . ."; however, on another page of the same book, they state that "the psychopath is inferior . . . intellectually. . . ." Again, these authors hold that the condition of the psychopath is "clear-cut and uniform in its symptomatology . . ."; but in the very next paragraph, on the same page, still referring to the same diag-

[171] *Mental Disorder and Criminal Responsibility: A Symposium*, *supra* note 73, at 82.

[172] RALPH S. BANAY, WE CALL THEM CRIMINALS 170 (1957).

[173] Guttmacher, *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in PAUL H. HOCH & JOSEPH ZUBIN (EDS.), CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS 155 (1953).

[174] MEDICAL OFFICER OF THE SUPREME BENCH OF BALTIMORE CITY, REPORT 8 (1951).

[175] Guttmacher, *Principal Difficulties with the Present Criteria of Responsibility and Possible Alternatives*, MODEL PENAL CODE app. B, at 177 (Tent. Draft No. 4, 1955).

nosis, they assert that "there is no symptom, syndrome or behavior dynamics upon which one may base a diagnosis."[176]

How is psychopathic personality diagnosed? Numerous psychiatrists have explicitly and implicitly admitted that to diagnose this disease they do not need to examine the subject's body—which, incidentally, is universally acknowledged to be the only legitimate object of investigation in every other branch of medicine. To diagnose psychopathic personality, the psychiatrist needs to examine only the subject's FBI record. Numerous psychiatrists have explicitly stated that they can make this diagnosis if they have access to only the social history of the "patient," particularly a record of his crimes. One example is Strecker's statement that "since there are no strong and clear-cut diagnostic criteria, the diagnosis [psychopathic personality] has to be made retrospectively on the basis of a long history of psychopathic behavior."[177] An even more pointed example is provided by the following quotation: "For diagnosis of these states [psychopathic personality] an adequate social history is imperative. The psychopath is not apt to reveal his difficulties with the environment voluntarily."[178] One of the newest textbooks on psychiatry teaches that to place a subject in the category of psychopathic personality, "the antisocial behavior of the patient should be the principal manifestation of the disorder."[179] Another textbook advises that "no diagnosis of psychopathic personality should be made in the absence of punishable or censurable acts episodically carried out."[180] Davidson, although discussing psychopathy in witnesses rather than in offenders, makes the following statement, which obviously would apply in any context:[181]

> The diagnosis of psychopathy is not made by examination but by a review of the life history. Examination shows nothing. The life history shows a record of trouble, of shiftlessness, of nomadism, of dishonesty, of nonconformity, of mischief or of some similar trait. When this is the history in a witness of good intelligence and obvious sanity, one has the right to suspect psychopathy.

It is clear what is being admitted in all these excerpts: To be able to diagnose psychopathy, the psychiatrist needs to have evidence that the subject shows a history of psychopathy. A history of psychopathy consists of the subject's record of crime or of other social maladjustment. Given this history, the psychiatrist can diagnose psychopathy. Obviously, a psychiatrist is not needed to diagnose psychopathy. The policeman or the file clerk keeping criminal records could fully measure up to the task.

It should be very clear by now—to all except those who are immovably determined not to allow reason to interfere with their worshipful admiration of psychiatry

[176] DANIEL J. MCCARTHY & KENNETH M. CORRIN, MEDICAL TREATMENT OF MENTAL DISEASES 402, 403, 405 (1955).

[177] EDWARD A. STRECKER, FUNDAMENTALS OF PSYCHIATRY 182 (5th ed. 1952).

[178] Dunn, *The Psychopath in the Armed Forces: Review of the Literature and Comments*, 4 PSYCHIATRY 251, 253 (1941).

[179] EWALT, STRECKER, & EBAUGH, *op. cit. supra* note 156, at 258.

[180] O'CONNOR, *op. cit. supra* note 162, at 300.

[181] Davidson, *How Trustworthy Is the Witness?*, 2 J. FORENSIC MED. 14, 18 (1955).

(an all too common foible)—that there is no such thing as a medical (psychiatric) "disease" called psychopathic or sociopathic personality. This disease, like so many others in psychiatry, is a figment of the fertile imagination of psychiatrists. Psychopathy is nothing but a synonym for crime and delinquency. Whether or not a person is said to have this disease depends, like so many other diseases in psychiatry, more on what is going on in the head of the psychiatrist than what is going on in the head of the "patient." Just such an observation comes from an unexpected source. Karpman has noted:[182]

> . . . [I]t is perhaps more likely that in studying 100 consecutive cases diagnosed psychopathic personality, what we get is not an understanding of the patient, but a study of the mind of a psychiatrist, that is what he means when he makes a diagnosis of psychopathic personality. It is then discovered that the average psychiatrist calls an individual psychopathic if in some way the individual has gone against the social grain.

Despite all the evidence available, only an insignificant proportion of which has been presented here, despite the disconcerting observation by a psychiatrist that "at present there is no objective proof that they [psychopaths] are ill rather than wicked . . .";[183] despite the fact that Cleckley, one of the foremost proponents of the concept of psychopathy, grants that its "psychopathology . . . is debatable and scarcely to be proved in courts,"[184] despite the angry accusation by Kinberg, the internationally known forensic psychiatrist, that in their approach to psychopathic personality, psychiatrists are practicing something that looks very much more like quackery than medicine,[185] the courts are admitting testimony about this diagnosis and are allowing the adjudication and disposition of cases to be influenced by it. This concept and psychiatric testimony about it should not be allowed in court, no disposition of cases should be based on it, and it should not be considered in any serious way in deliberations about defendants. No laws incorporating this concept, in any of its forms or under any of its names, should be passed. Legislation of this type already passed should be repealed. And, it goes without saying, correctional decisions should not be based on such a diagnosis.

In the meantime, society, especially the legal profession, would be wise to keep a very close watch over those courts that allow psychiatrists to testify about this concept. A court that would allow this is just as likely to allow testimony on witchcraft. More heed should be given to those psychiatrists who are capable of at least some sensible judgment about this matter, as illustrated in the following reflection: "Perhaps our psychopathic personality is the heretic or witch in modern guise."[186]

[182] Karpman, *Psychopathy as a Form of Social Parasitism—A Comparative Biological Study*, 10 J. CLIN. PSYCHOPATH. 160, 172 (1949).

[183] W. LINDESAY NEUSTATTER, THE MIND OF THE MURDERER 171 (1957).

[184] Cleckley, *The Psychopath Viewed Practically*, in ROBERT M. LINDNER & ROBERT V. SELIGER (EDS.), HANDBOOK OF CORRECTIONAL PSYCHOLOGY 412 (1947).

[185] Kinberg, *On the Concept of "Psychopathy" and the Treatment of So-called "Psychopaths,"* 93 J. MENTAL SCI. 93 (1947).

[186] Roche, *Truth Telling, Psychiatric Expert Testimony and the Impeachment of Witnesses*, 22 PA. BAR ASS'N Q. 140, 152 (1951).

And no special perspicacity is needed to see a statement like the following, made by a psychiatrist in the course of an assault on the law for its reluctance to show greater hospitality to psychiatry, for the fraudulent pretense that it is: ". . . [J]udges have ridden roughshod over perfectly valid scientific discoveries such as the nature of psychopathy. . . ."[187]

V

PSYCHONEUROSIS

Another mental condition frequently said to be associated with delinquent and criminal behavior is psychoneurosis, or, to use the equivalent and shorter term, neurosis. It is impossible to state briefly the psychiatric position on the relationship between neurosis and delinquency or crime for two reasons: first, there is endless disagreement among psychiatrists on every facet of the concept of neurosis; and second, there are as many views on its relation to delinquency and crime as there are psychiatrists.

A psychiatrist who is an outstanding expert on neurosis recently made the following observation:[188]

> Probably nothing has been less conclusively defined than the nature of the neurotic process; and about nothing is there more confusion between laymen and behavioral scientists, among the several varieties of behavioral scientists, and even within the close fraternity of psychiatrists and the even closer fraternity of analysts.

This has been echoed by numerous experts. But it is not only the "nature of the neurotic process" that is in doubt. Usually, many more aspects of the concept are brought into question, as can be seen from the following typical conclusion: "Psychiatric diagnosis of neurosis is not yet standardized; there is variation in the nomenclature and the meaning ascribed to the diagnostic categories. There is widely differing emphasis on phenomenology, and etiology."[189]

Despite this reported state of uncertainty and the apparent divergence in viewpoints, neurosis is usually denominated a "disease." One psychiatrist, for example, counsels that neurosis "is always to be looked upon as a sickness (disease). . . ."[190] Another has pointed out that "mental disease is a term which includes psychosis and neurosis."[191] No psychiatrist who takes the position that neurosis is a disease, however, has ever specified the organ in which it occurs, the type of lesion involved, or the kind of trauma, chemical imbalance, bacteria, virus, or other agent thought to be instrumental in its causation. If neurosis is a disease and if psychiatrists proceed in the manner of other medical practitioners—a point on which they unblushingly

[187] Glover, *Outline of the Investigation and Treatment of Delinquency in Great Britain: 1912-1948: With Special Reference to Psychoanalytical and Other Psychological Methods*, in EISSLER, *op. cit. supra* note 26, at 435.

[188] Kubie, *Social Forces and the Neurotic Process*, in ALEXANDER H. LEIGHTON, JOHN A. CLAUSEN & ROBERT N. WILSON (EDS.), EXPLORATIONS IN SOCIAL PSYCHIATRY 80 (1957).

[189] Freedman & Hollingshead, *Neurosis and Social Class*, 113 AM. J. PSYCHIATRY 769, 771 (1957).

[190] Ginsburg, *supra* note 100, at 58.

[191] Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336, 337 (1955).

insist—then it is incumbent upon them to show diseased tissue in neurosis. On the other hand, there are some psychiatrists who say that neurosis is not a disease. Some say that neurosis is the inability to get along with people.[192] But that is not disease; nor is it a medical problem. Another view has it that neurosis, and psychosis, too, for that matter, are not diseases located in the individual, but are problems involving group organization.[193] But this is a concern of sociology, not medicine.

If neurosis is a disease, then it, like psychopathic personality, is one of the strangest kind of disease imaginable. This is certainly the impression one gets from a very recently-issued report of a comprehensive and elaborate research on the relationship between mental illness and social class, undertaken by a team of psychiatrists, sociologists, psychologists, and others. Based on their study of the processes out of which psychiatric diagnoses emerge, these investigators were forced to the following observation:[194]

> We take the position that a neurosis is a state of mind not only of the sufferer, but also of the therapist, and it appears likewise to be connected to the class positions of the therapist and the patient. A diagnosis arises from a number of conditioning factors: the experiences of the patient, the training and techniques of the doctor, as well as the social values of the community. Stated otherwise, a diagnosis of neurosis is a resultant of a social interactional process which involves the patient, the doctor, and the patient's position in the status structure of the community.

Apparently, then, the diagnosis of neurosis in a "patient" is dependent on the intricate convergence of a number of factors—the mental condition of the psychiatrist, a process of social interaction, the relative social class positions of the psychiatrist and the patient, and the social values prevailing in the community. These researchers also learned that the concept of neurosis can have reference to either a theological dogma, a philosophical premise, or a bodily disturbance: "The sinfulness of the Bible, the *Angst* of the Kierkegaardians, the 'nausea' of the existentialists, and the 'stress' of the internists are all syndromes which may be and have been subsumed under the term neurosis by some experts."[195] It is clear that one cannot be too sure whether an attack of neurosis is a problem calling for the ministrations of the physician or of the preacher.

It should be reiterated that the problems associated with the diagnosis of neurosis, as is true of other psychiatric diagnoses and concepts, are not matters of mere academic import. The psychiatrist's views on neurosis and all the inferences he draws from them can affect offenders in a multitude of ways. It is obvious that if a psychiatrist considers psychopathic personality to be a mental disease but does not so consider neurosis, or vice versa, and if a criminal act resulting from a mental

[192] Redlich, *The Concept of Health in Pyschiatry*, in LEIGHTON, CLAUSEN, AND WILSON, *op. cit. supra* note 188, at 144.

[193] Ruesch, *Social Factors in Therapy: A Brief Review*, in ASS'N FOR RESEARCH IN NERVOUS AND MENTAL DISEASE, PSYCHIATRIC TREATMENT 71 (1953).

[194] AUGUST B. HOLLINGSHEAD & FREDRICK C. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS 237 (1958).

[195] *Id.* at 239.

disease is not punishable, the differential diagnosis of these two conditions becomes a critical matter. Therefore, it is important to take a look at the notions of the psychiatrists on the relationship between neurosis and criminal or delinquent behavior, which, as has been stated and as can be guessed by now, are the subject of abounding controversies.

One psychiatrist includes "the child's delinquent behavior—*all* delinquent behavior—within the framework of the neuroses." He contends that "the delinquent act is but a special type—a syndrome . . . within the group designated 'the neuroses.' "[196] Yet, one psychiatrist found that only twenty-four, or .6 of one per cent, out of 4,000 delinquents examined by him gave evidence of a psychoneurotic reaction.[197] On the other hand, in the well-known study by the Gluecks, it was found that 24.6 per cent of 500 delinquents were neurotic—a proportion over forty times larger than that found in the report just cited.[198] It is the observation of a psychiatrist that "most" children with a long history of delinquency referred to child guidance clinics are neurotic.[199] Yet, psychiatrists who examined the more serious delinquents referred to them by a juvenile court during a one-year period diagnosed only 4.4 per cent as neurotic.[200] One psychiatrist has expressed the opinion that psychoneurosis "constitutes quite a considerable group of the delinquents."[201] This is contradicted by another, however, who says that it is "rare" for neurosis to be a decisive factor in delinquency.[202]

Into the midst of these ongoing debates and these diligent efforts to settle on the incidence of neurosis among delinquents, one psychiatrist recently interjected what is not a new, but is, nonetheless, a most disconcerting, observation, and one which will be discussed presently. He announced that there is an antithetical relation between psychoneurosis and delinquency!—[203]thereby embarrassing all those practitioners who have given sworn testimony before any number of boards, committees, and commissions that neurosis is a cause of delinquency and who, through the years, have been confidently making known publicly the varying proportions of delinquents in whom they have found neurosis. The issue is further complicated by those psychiatrists who find delinquents to be less neurotic, or less often neurotic, than nondelinquents. Jenkins, as do others, comes to this conclusion. He first dismisses the theory that neurosis can account for all or a major fraction of delinquency as one that "neither rings true nor makes sense." He then reasons that the delin-

[196] Gardner, *The Community and the Aggressive Child: The Expression of the Aggressive-Destructive Impulses in Juvenile-Delinquent Acts*, 33 MENTAL HYGIENE 537, 541 (1949).

[197] East, cited by Gillespie, *Psychoneurosis and Criminal Behaviour*, in RADZINOWICZ & TURNER, *op. cit. supra* note 42, at 72.

[198] SHELDON & ELEANOR T. GLUECK, UNRAVELING JUVENILE DELINQUENCY 239-40 (1950).

[199] Lippman, *Difficulties Encountered in the Psychiatric Treatment of Chronic Juvenile Delinquents*, in EISSLER, *op. cit. supra* note 26, at 157.

[200] JUVENILE COURT OF CUYAHOGA COUNTY (CLEVELAND) ANN. REP. table 15, at 38 (1957).

[201] Rees, *Mental Variations and Criminal Behaviour*, in RADZINOWICZ & TURNER, *op. cit. supra* note 42, at 6.

[202] Chess, *Juvenile Delinquency: Whose Problem?*, Fed. Prob., June 1955, pp. 29, 30.

[203] Glover, *Psycho-Analysis and Criminology: A Political Survey*, 37 INT'L J. PSYCHO-ANAL. 311, 314 (1956).

quent is inclined to be less neurotic than the nondelinquent. And he pushes the point even further by describing the delinquent as one who is less prone to manifest neurotic tendencies than are people in general.[204] In the research by the Gluecks, in which a comparison is made between nondelinquents and delinquents, a significantly higher proportion of neurotics was found among the former than among the latter.[205]

But suppose, for purposes of argument, it is granted that a major fraction (or even all) offenders are neurotic. This would not distinguish them from various specified groups in the population, from a large majority of human beings, or even from all the inhabitants of this planet, if the judgment of certain psychiatrists can be trusted. Take, for example, the research on the relationship between mental illness and social class already referred to. One of its findings is that a considerable proportion of the neurotics found in the upper social classes comprised psychiatrists, psychologists, nurses, social workers, artists, other professional workers, and persons in the communication business.[206] In another research, it was discovered that college students are as frequently neurotic as are prison inmates.[207] In a survey of the incidence of mental disorders among a random sample of the residents of a community of three thousand people, it was found that fifty-seven per cent were neurotic.[208] One psychiatrist has claimed, "To understand the neuroses is to understand the average person. . . ."[209] Another has insisted that few residents of this continent can be called "nonneurotic."[210] Finally, a psychiatrist has gone on record as concurring with another expert whom he paraphrases as saying that "all persons, in all cultures, are victims—whether to a greater or to a lesser extent—of a widely prevalent social neurosis the existence of which is now evident beyond any question . . . ,"[211] thus still leaving unsettled the question whether neurosis is a social or a medical phenomenon.

When it comes to the matter of similarities and differences between neurosis and psychopathic personality, the chaos is complete. Sometimes, one encounters the view that these diseases are worlds apart, and sometimes, that they are one and the same. Thompson holds to the former view, saying that the dissimilarity between the two diseases is "essentially complete."[212] In another source, he joins a colleague in the following elaboration: "The psychopath and psychoneurotic seem to be at opposite extremes with regard to personality function."[213] And they emphasize that when it comes to the traits characterizing the two diagnostic categories, "the in-

[204] Jenkins, *Adaptive and Maladaptive Delinquency*, 11 NERVOUS CHILD 9, 11 (1955).
[205] SHELDON & ELEANOR T. GLUECK, *op. cit. supra* note 198.
[206] HOLLINGSHEAD & REDLICH, *op. cit. supra* note 194, at 337.
[207] Levy *et al.*, *The Outstanding Personality Factors Among the Population of a State Penitentiary: A Preliminary Report*, 13 J. CLIN. & EXPER. PSYCHOPATH. 117, 121 (1952).
[208] Leighton, *The Distribution of Psychiatric Symptoms in a Small Town*, 112 AM. J. PSYCHIATRY 716, 722 (1956).
[209] LEON J. SAUL, EMOTIONAL MATURITY vii (1947).
[210] JAMES CLARK MOLONEY, THE BATTLE FOR MENTAL HEALTH 8 (1952).
[211] Thornton, Book Review, 41 J. CRIM. L., C. & P.S. 807 (1951).
[212] THOMPSON, *op. cit. supra* note 123, at 50.
[213] NIELSEN & THOMPSON, *op. cit. supra* note 138, at 185.

compatibility seems absolute."[214] But this orientation is negated by Federn, who, in speaking of criminal psychopathy, holds that this condition is "usually combined with neurotic symptoms and neurotic character traits."[215] And Schilder says he inclines to the view that the two terms, "psychopathic" and "neurotic," are "equivalent."[216] Guttmacher goes even further toward obliterating the distinction when he writes that criminal psychopaths "suffer from a deep-seated neurosis."[217]

The opinions just recounted cast serious doubt, to say the least, on the separability of psychopathic personality and neurosis as two distinct and vastly dissimilar disease entities. Any lingering doubt is completely removed by still another theory that has numerous adherents among psychiatrists. This theory makes of psychopathic personality nothing more than a manifestation of neurosis. It is explained by those who identify with this school of thought that psychopathic personality *is* neurosis expressed in antisocial behavior.[218] Persons are diagnosed as psychopathic, according to this scheme, "when their antisocial behavior is the principle [*sic*] manifestation of their neurosis."[219] But these definitions are precisely the ones psychiatrists give of neurotic delinquency itself, without reference in any manner or form to psychopathic personality. A typical example is the following: "The essential feature of neurotic delinquency is that it represents behavior directed against society to express a neurotic conflict."[220]

Now, it so happens that such assertions—that psychopathic personality is neurosis manifested in antisocial behavior, that neurotic delinquency is the solution of neurotic conflicts through the commission of aggressive acts, and the simple assertion that neurotics do commit delinquency and crime—are in complete conflict with another postulate, referred to earlier in passing, often made by psychiatrists. This postulate affirms that it is inherent in the very nature of neurosis that those afflicted with it do not commit offenses. Further, it is contended that the psychopath "acts out" (to use the psychiatric jargon for the commission of aggressive, criminal, or destructive deeds), in contradistinction to the neurotic who does not act out, but rather suffers inwardly or escapes into fantasy. According to Alexander, for example, the very criterion that distinguishes psychopaths from neurotics is that "they [psychopaths] 'act out' their neurotic impulses, in contrast to psychoneurotics whose most important activity is in their fantasy."[221] Sometimes the same point is made in a different way. Abrahamsen, to choose only one example from among many, claims that the offender may get relief from his conflicts through his antisocial actions, but that such an escape

[214] *Id.* at 188.
[215] PAUL FEDERN, EGO PSYCHOLOGY AND THE PSYCHOSES 180 (Edoardo Weiss ed. 1952).
[216] SCHILDER, *op. cit. supra* note 48, at 278.
[217] Guttmacher, *Medical Aspects of the Causes and Prevention of Crime and the Treatment of Offenders*, 2 BULL. WHO 281 (1949).
[218] BEULAH CHAMBERLAIN BOSSELMAN, NEUROSIS AND PSYCHOSIS 55 (2d ed. 1956).
[219] EDWARD A. STRECKER AND OTHERS, PRACTICAL CLINICAL PSYCHIATRY 310 (7th ed. 1951).
[220] HYMAN S. LIPPMAN, TREATMENT OF THE CHILD IN EMOTIONAL CONFLICT 191 (1956).
[221] FRANZ ALEXANDER, FUNDAMENTALS OF PSYCHOANALYSIS 235 (1948).

is not open to a neurotic because he is "too inhibited."[222] However, Banay declares that just the opposite is true—namely, that one of the means by which offenders get release from neurotic conflicts is to commit delinquencies rather than to remain inhibited.[223] And others go even further and say that a neurotic offender commits crimes "precisely *because* he is over-inhibited. . . ."[224]

Understandably, two psychiatrists recently sought to evade this whole horrendous muddle. Brancale and Heyn reported that those offenders whom they now diagnose as neurotic correspond to those formerly diagnosed as psychopathic.[225] And Karpman, who is Chief Psychotherapist at St. Elizabeth's Hospital, apparently refusing to let this diagnostic fuss stay his therapeutic hand, has solved the problem at least for one category of offenders: "I have developed a rather simple method of dealing with sexual offenders; I merely change the diagnosis from one of psychopathy to one of neurosis and then proceed to treat as any neurosis."[226]

The diagnosis of neurosis obviously is no more reliable or valid than is the diagnosis of psychopathic personality. This and the other criticisms that can be made of the diagnosis of neurosis need not be rehearsed in detail. They are precisely the same as have already been made respecting psychopathic personality.

VI

CONCLUSIONS

Psychiatric testimony should not be admissible in court. The courts have traditionally followed the principle that expert testimony and evidence that purport to be scientific will not be admissible unless their reliability and validity have been amply tested and unless substantial agreement among the appropriate experts has been demonstrated. When it comes to psychiatric testimony, the courts are acting in heedless disregard and flagrant violation of this eminently sound principle. It should be unmistakably clear on the basis of the evidence adduced here—only a tiny part of the available evidence—that psychiatrists have not attained the level of competence and scientific reliability and validity necessary to make their testimony eligible for serious consideration by the courts. Neither should it be looked upon as an objective and sound basis for coercive decisions, judicial or correctional. The courts should not allow psychiatric testimony to be heard, irrespective of whether the psychiatrists are partisan or court-appointed, attached to a court clinic or to a hospital.

Furthermore, the courts and correctional agencies should not persist in giving legal and official support and sanction to the almost universal fallacy of considering psychiatrists to be experts on human behavior, motivation, personality, interpersonal

[222] Abrahamsen, *Family Tension, Basic Cause of Criminal Behavior*, 40 J. CRIM. L. & CRIMINOLOGY 330, 336 (1949).

[223] RALPH S. BANAY, YOUTH IN DESPAIR 141 (1948).

[224] ALBERT ELLIS & RALPH BRANCALE, THE PSYCHOLOGY OF SEX OFFENDERS 39 (1956). [Italics in original.]

[225] Brancale & Heyn, *Detection, Classification, and Treatment of the Youthful Offender*, Fed. Prob., March 1957, pp. 33, 36.

[226] BENJAMIN KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 574 (1954).

relations, problems of social organization, emotional reactions, crime and delinquency, other social problems, and similar nonmedical topics. It is astounding that judges and correctional officials continue to view psychiatrists as experts on human behavior when there is considerable experimental and other research which shows laymen to be superior to psychiatrists and associated personnel in the judgment of peoples' motives, emotions, abilities, personality traits, and action tendencies.[227]

It is certainly puzzling that the courts insist on admitting psychiatric testimony in spite of the fact that some psychiatrists have repeatedly given candid and pointed warnings against the dogmatism, aggressiveness, dubious tactics, and irresponsibility of some of their colleagues, particularly those who have succeeded in overselling psychiatry to the legal profession and to the general public. Some of the more cautious practitioners know full well that psychiatry does not have knowledge that would be helpful in the administration of justice. One of these, whose statement to this effect has already been cited,[228] makes the following rejoinder to the claim of some psychiatrists that their success in bringing about changes in the laws of criminal responsibility is due to the increasing knowledge of human behavior accumulated during the past fifty years: "But is this why they have succeeded? I think not. They have succeeded rather because they now possess more social power than they had in the past."[229]

[227] Taft, *The Ability to Judge People*, 52 PSYCHOLOGICAL BULL. 1 (1955).
[228] See *supra* note 15.
[229] Szasz, *supra* note 15, at 314.

THE SOCIOLOGICAL APPROACH TO CRIME AND CORRECTION

DANIEL GLASER*

The approach to crime which is distinctively sociological assumes that the criminal acquires his interest, ability, and means of self-justification in crime through his relationship to others. This conception contrasts sharply with those psychoanalytic and biological approaches which conceive of crime as the expression of innate impulses which the criminal has not learned to control.[1] It will be noted, however, that in recent years, the sociological conception has been largely accepted by many persons identified with disciplines other than sociology.

I

THE EARLY CULTURAL EMPHASIS

The early divergence of sociological and psychological approaches to crime probably stems in part from the fact that criminals and delinquents were referred as separate individuals, to psychiatrists and psychologists, from whom diagnoses and prognoses were requested. Also, these specialists were likely to receive a disproportionate number of offenders who exhibited emotional instability or other psychological defect. In contrast, sociologists first studied crime as a statistical phenomenon, comparing the total arrest or conviction rates of different countries, cities, neighborhoods, occupations, races, social classes, and other collective units. The sociologist's problem was to explain the differences which he found in such group rates. The cases brought to his attention consisted of all persons who had official crime or delinquency records.

To the sociologist, all intergroup differences in behavior patterns were understandable only if seen as consequences of the cultures in which individuals are reared. A culture, however, was seen as understandable only in terms of its history, which antedates any single individual. To oversimplify slightly, one might say that the sociologist explained the prevalence of criminal behavior in one group and noncriminal behavior in another in the same way in which he would explain the fact that people reared in Paris talk French and people reared in Omaha talk English.

Space does not permit detailed review of nineteenth and early twentieth century European writings which foreshadowed this culture determinism approach. It may suffice to point out that some writings of this period which were called "sociology,"

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[1] *Cf.* AUGUST AICHHORN, WAYWARD YOUTH 4 (1935); Michaels, *Delinquency and Control*, 24 AM. J. ORTHOPSYCHIATRY 258 (1954).

like those of the Italian journalist Enrico Ferri, were not very sociological. On the other hand, the works of the French psychologist and magistrate Gabriel Tarde contained much which closely resembled the criminological writings of American sociologists forty years later.

The cultural emphasis achieved its major influence in the second quarter of the twentieth century. Its leading protagonist was the late Clifford R. Shaw, whose constant collaborator was Henry D. McKay. Their contributions were a series of statistical studies and case histories of delinquency in Chicago.[2] Among their principal findings, which have stood the test of time fairly well, were: (1) delinquency is concentrated in deteriorated slums located in those portions of a city which once were residential, but are changing to commercial and industrial districts; (2) these areas always have the highest delinquency rates, even after their population changes almost completely in national descent or race; (3) organized vice, political corruption, and most other social problems are concentrated in these areas, and case study analysis indicates that this is because social control breaks down there owing to the low social status of the residents, their newness to the urban scene, and the unattractiveness of the area for new residential investment and development; (4) as residents of these areas move elsewhere in the city, the delinquency rates of their children decrease; (5) delinquents from the high-delinquency areas have higher recidivism rates than other delinquents; (6) delinquency is usually group behavior from the outset and becomes group behavior to a greater extent as youth become more advanced in delinquency (they found that only 11.8 per cent of delinquents known to the juvenile court and only 6.9 per cent of all juvenile stealing cases were cases of lone delinquency); and (7) gangs are traditional in the streets of the high-delinquency areas, and youth are enculturated into delinquency in the normal course of growing up in these areas.

Shaw's approach to the study of delinquency was extended through similar research by others. Notable was F. M. Thrasher's investigation of 1313 boys' gangs in Chicago, in which he traced the manner in which spontaneous children's play groups in the slums become transformed into unified criminal gangs through exciting disapproval and, therefore, becoming collectively involved in conflict with other gangs, police, and other adults.[3] It was shown that in the slum, the gang successfully competes with legitimate agencies to meet fundamental needs of youth for recognition, excitement, affection, and loyalty. Also, services of the gang to politicians, dealers in stolen goods, and organized vice and crime syndicates were shown to cause these agencies to reciprocate by helping the gang in resisting its enemies and by providing career opportunities for its leaders. While Chicago was

[2] CLIFFORD R. SHAW & HENRY D. MCKAY, DELINQUENCY AREAS (1929), THE JACKROLLER (1930), NATURAL HISTORY OF A DELINQUENT CAREER (1931), SOCIAL FACTORS IN JUVENILE DELINQUENCY, published as 2 U. S. NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE CAUSES OF CRIME (1931), BROTHERS IN CRIME (1938).

[3] F. M. THRASHER, THE GANG (2d ed. 1936).

the center for the Shaw-MacKay-Thrasher-type of research, it also was carried on in at least twenty other cities, with largely similar findings.[4]

This picture of the slum youth learning crime, as children in other cultural communities learn good manners and legitimate ambitions, through enculturation, also was extended to explain the behavior of adult professional criminals. The late Edwin H. Sutherland, dean of American criminologists, annotated and published in 1937 a professional thief's account of his profession.[5] It showed how members of this profession gradually acquire a complex of highly-specialized techniques, including skill in planning offenses, verbal abilities for dealing with victims and with the law, knowledge of how to dispose of stolen goods, and, if detected, the ability to "fix" a case by dealings with the police, court officials, and victims. Such knowledge is acquired only through association and cooperation with thieves, much of the former occurring in jails and prisons. As the thief becomes sophisticated in these professional techniques, he acquires an honorific status and looks down on more amateur offenders. Like a member of any other profession, he shares the *esprit de corps* of the profession and incorporates into his own thinking his profession's consensus of values. He thus lives in a somewhat distinct cultural world, insulated from opposing values in the larger societies.

One final work might be mentioned, a highly influential criminology textbook, *Crime and the Community*, which was written by a Columbia University Professor of Latin American History, Frank Tannenbaum, assisted by Magistrate Morris Ploscowe, John Dewey, and others, including inmates of New York state prisons.[6] The literary skills of these authors enabled them to describe this process of enculturation in a much more vivid style than that usually found in sociologists' writings. The introduction to criminal careers was ascribed to "the dramatization of evil" in the arrest, jailing, and trial experience of the first offender. The procedures involved here were described as tagging the individual as a criminal, emotionally rejecting him from respectable society, and making the company of other delinquents or criminals the sole place where he can find acceptance, solace, encouragement, and even prestige. Subsequent experience is described as habituation to crime as a way of life; it becomes normal activity for the criminal and has a variety of supporting influences. Further experience with law enforcement agencies is portrayed as a "hardening process," the ultimate result of which is the "warrior psychosis" of the professional criminal. The latter is seen as motivated by fear and by a philosophy

[4] *Cf.* CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (1942). A notable, but little publicized, outgrowth of this research is the shift in delinquency prevention from child-guidance clinics and settlement houses to "corner workers," "detached social group workers," slum resident committees, and "reaching out" (or "aggressive") social work. The latter locate and work with delinquents and gangs, even in the face of resistance initially, rather than waiting for them to seek counsel or aid. This approach was pioneered and still is being led, in many respects, by Shaw's Chicago Area Projects.

[5] EDWIN H. SUTHERLAND, THE PROFESSIONAL THIEF (1937).

[6] FRANK TANNENBAUM, CRIME AND THE COMMUNITY (1938).

which sees all life as a racket and which thereby justifies any means to the end of self-preservation.

II

THE GREAT DEBATES

The almost exclusive reliance of sociologists on enculturation as an explanation for delinquency and crime during the second quarter of this century involved them in frequently bitter debates with psychologists, psychiatrists, and biologists, as well as with legal and theological writers.

Sutherland's *Principles of Criminology,* which first appeared in 1924 and which, in its successive editions, has been by far the most successful text in criminology, from the outset criticized "psychopathy" as an etiological concept. Sutherland pointed out that some psychiatrists diagnosed almost all criminals as psychopaths, making the two terms virtually synonymous, while others used it for only a small percentage of criminals. In any case, Sutherland contended, psychopathy was too vague a concept for useful diagnosis, and if it were used as synonymous with certain patterns of criminality, it still left these patterns to be explained. His implication was that these patterns of criminality, like others, were mainly "the result of social interactions," an interpretation consistent with much current psychiatric theory, but in contradiction to the constitutional explanation of psychopathy then implicit or explicit in most use of this term.

Sociologists also attacked other psychological explanations for criminality, particularly low intelligence and personality. This offensive reached a high point in 1950, when two of Sutherland's students, Karl F. Schuessler and Donald R. Cressey, reviewed 113 attempts to differentiate criminals from noncriminals by means of personality tests.[7] They found that only forty-two per cent of these efforts yielded significant differentiations between average scores, but the deviation from the average among both the criminals and the noncriminals created so much overlap as to make none of these tests adequate for diagnosis or prediction of criminality. Furthermore, differences in education and social class between the criminal and the control groups tested, as well as the effects of imprisonment on the criminals studied (who usually were prison inmates), might account for most of the differences found in their test responses.

During this period, the enculturation explanation for crime also led many sociologists to ally themselves with psychiatrists in war against classical legalists and fundamentalist religious leaders on the free-will versus determinism issue. To this writer, this conflict seems to be a "phony war" in which the combatants disagree not in their conception of human behavior so much as in their taste regarding usage of the words "free-will" and "determinism." In their polemical zeal, however, each side misrepresents both its own and its opponents' conceptions (a common feature of arguments). The determinists, contrary to implications conveyed in the

[7] Schuessler & Cressey, *Personality Characteristics of Criminals,* 55 AM. J. SOCIOLOGY 476 (1950).

debate, recognize that humans experience awareness of alternative possible courses of behavior and make deliberate choices between those alternatives which they perceive. And the free-will exponents, in spite of assertion in argument, recognize that the course of a human's behavior is a function of the perceptions which he has had—which is why they are so concerned that children receive "correct" teaching and preaching.

The determinist position results from the metaphysical view of the world as "interconnected," which underlies any scientific explanation for events. The free-will position grows out of different metaphysical foundations, stressing the autonomy rather than the connectedness of certain components of the universe—a stress necessary for ethical or theological evaluation of behavior. Increasingly, however, the use of different frames of reference for different types of problem is accepted in science and philosophy.[8] The free-will versus determinism debate seems likely to lose its intensity from this increasing awareness of the influence of conceptual frameworks on thought, from declining interest in metaphysical issues, and from the growing interests of sociologists, psychologists, and psychiatrists in voluntaristic rather than reflexive conceptions of human behavior.

The "great debates" between sociology and psychology have lost some of their former fervor. The disputes ultimately led to concessions on both sides, or more accurately, to reformulations on both sides. Sociologists succeeded impressively well in discrediting monopolistic claims of other disciplines to a single simple explanation for crime.[9] They have, however, been less successful in formulating a single general explanation for crime on which they could agree.

III

EFFORTS AT INTEGRATION

Perhaps the most telling criticism which sociologists encountered in defending enculturation explanations for crime was the failure of these explanations to account for the nondelinquents in high-delinquency areas. Sociologists were inclined to dismiss this by asserting that most of these simply were delinquents who had never been caught. Sociologists employed on delinquency prevention programs in high-delinquency areas, however, became increasingly aware of the conflict of criminal and noncriminal values in the culture to which any youth is exposed.[10] Sociologists employed in prisons and parole systems were impressed with the noncriminal ties of many offenders. This impression is even gained to an extent not warranted by the facts, because prisoners are motivated to convey a noncriminal picture of themselves to the treatment staff. The study of white-collar crime and surveys of un-

[8] JOHN DEWEY & A. F. BENTLEY, KNOWING AND THE KNOWN (1949); JAMES B. CONANT, MODERN SCIENCE AND MODERN MAN (1952).

[9] The most up-to-date summary of sociological criticism in criminology is GEORGE B. VOLD, THEORETICAL CRIMINOLOGY (1958). A more brief and abstract critique of theoretical models in criminology is provided in Glaser, *Criminality Theories and Behavioral Images*, 56 AM. J. SOCIOLOGY 433 (1956).

[10] *Cf.* Kobrin, *The Conflict of Values in Delinquency Areas*, 16 AM. SOCIOLOGICAL REV. 635 (1951).

detected crimes admitted by respected persons blurred the distinction which previously characterized the sociological image of a criminal and a noncriminal society within the United States.[11] Finally, violent crimes committed by individuals clearly not involved in a criminal social world, while small in the total crime rates of the country, were extremely difficult to explain sociologically, received an inordinate amount of attention in public discussion of crime, and were easily interpreted speculatively by a variety of untestable psychoanalytic postulations on unconscious symbolism.

One mode of reaction to these shortcomings of enculturation explanations for crime was to assert that all crime is affected by a multiplicity of factors and that different factors are prepotent in different offenses. This solution offered no framework for specifying the exact function of particular factors in separate crimes nor any indication of interrelationship between the factors. Multiple causation was accepted by criminologists of diverse academic background, and this made it appear to the more casual student that they all were agreed. Each of the exponents of multiple causation, however, continued to emphasize his previous pet theory. The sociologists stressed culture, and the psychologists, personality, while scattered other writers emphasized biological or other interpretations, although all piously generalized on multiple causation.

A foreshadowing of a more general explanation for crime, to replace both multiple-factor and simple enculturation interpretations, was provided by Sutherland's "differential association" theory.[12] As the editors of his posthumous papers indicate, Sutherland conceived of this theory as tentative, "subject to revision in the light of criticism and research."[13] He revised it in several respects before his death, and its further development and refinement still is going on.

Slightly paraphrased, Sutherland's last formulation of his theory is as follows: Criminal behavior is learned in interaction with others, principally in intimate per-

[11] *Cf.* Newman, *White Collar Crime*, *infra* 735. Porterfield, *Delinquency and Its Outcome in Court and College*, 49 AM. J. SOCIOLOGY 199 (1943); Wallerstein & Wyle, *Our Law-Abiding Law-Breakers*, 25 PROBATION 107 (1947); E. H. SUTHERLAND, WHITE COLLAR CRIME (1949). "White-collar crime" refers to violation of law by respected persons as a routinely accepted feature of prevailing business (*e.g.*, misrepresentation in selling and collusion to reduce competition). Sociologists have debated heatedly the propriety of including white-collar crime in the basic subject matter of criminology. To the writer, however, this is an issue not meriting such controversy, since all boundaries of study should be flexible. Attention to white-collar crime makes a criminologist alert to the continuity between the attitudes toward law of persons called "criminal" and persons generally respected as though noncriminal. The fact that criminal prosecution rarely occurs in white-collar crime, however, makes its social consequences and interpretation necessarily somewhat different from ordinary crime, particularly felonies, and justifies some specialization in studying the latter. In this article, the writer's primary concern is with the most commonly prosecuted felony-type offenses. Arguments for including white-collar crime in criminology are presented in Hartung, *White-Collar Offenses in the Wholesale Meat Industry in Detroit*, 56 AM. J. SOCIOLOGY 25 (1950), with critical comment by E. W. Burgess and rejoinder by Hartung. Counter-argument is found in Tappan, *Who Is the Criminal?*, 12 AM. SOCIOLOGICAL REV. 96 (1947), and *Crime and the Criminal*, Fed. Prob., July-Sept. 1947, p. 41; Caldwell, *A Re-examination of the Concept of White-Collar Crime*, Fed. Prob., March 1958, p. 3.

[12] First set forth in EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 5-7 (3d ed. 1939).

[13] ALBERT COHEN, ALFRED LINDESMITH, & KARL SCHUESSLER (EDS.), THE SUTHERLAND PAPERS 6 (1956).

sonal groups. That which is learned includes techniques, attitudes, and rationalizations. Whether a person's motives and drives are criminal or noncriminal is a function of whether the legal codes have been defined by those around him in a manner favorable to their observance or to their violation. Most people encounter a mixture of these two types of influence. A person will become criminal if his associations result in an excess of definitions favorable to violation of law over definitions unfavorable to violation of law. The influence of such differential association is a function of its frequency, duration, priority, and intensity, in one direction or another. Both criminal and noncriminal behavior is acquired in such association by the same learning mechanisms, and both satisfy the same general human needs and values; but differential association determines the extent to which a person's experience promotes learning and motivation by criminal rather than noncriminal influences.

Sutherland seems to have formulated this theory as a way in which the many actual and alleged correlates of crime, such as poverty, family conflicts, personality disturbance, and slum residence, could be causally related to crime. These conditions, to be factors in the criminality of an individual, must so affect his social relationships as to promote his being influenced by criminals and restrict the influence of noncriminal persons on him. Attention to the social relationships of each person studied, however, would also explain why such correlates of crime as family conflict and poverty also may, in some cases, support noncriminal ambitions. From the standpoint of Sutherland's theory, any correlate of crime must be shown to affect an individual's learning experience if it is to be thought of as having a causative function in his criminality. Sutherland's critics generally overlook this integrating function of his theory and the broad sense in which he uses the phrase "differential association." They misrepresent him when they suggest that he predicted that criminality would result with mechanical certainty in any individual whose contacts with criminals exceed contacts with noncriminals.

Essentially, Sutherland set forth a broad point of view for approaching an understanding of criminals, rather than a simple formula for predicting crime. In modern social-psychological terms, what he seems to have had in mind might more aptly be labeled "differential identification," "differential reference," or even "differential learning." It involves a conception of crime as a subclass of the totality of all deliberate human action, as something to be explained as other so-called "voluntary" behavior is explained. It is based on a social-psychological conception of deliberate action as guided by the actors in accordance with the way in which they have learned to rationalize their actions. Such an approach to understanding behavior is convergent with many developments in psychology and sociology. It is a deterministic conception of crime, since it ascribes a person's anticipations to his learning experience; yet, it is consistent with the legal conception of crime as wilful, for it focuses on decision-making as a phenomenon to be studied. This approach contrasts sharply with explanations for crime in terms of biological drives, uncon-

scious motivation, or pressure of external forces, since such explanations do not as completely trace the connection between the alleged causes and specific, consciously-directed criminal acts.[14]

Sutherland presented his theory in highly abstract form and apart from its illustration. His illustrative chapters on "processes in criminal behavior" and "behavior systems in crime" cogently described the ways in which professional criminals become enculturated in crime, but he did not illustrate the influence of associations opposing crime. This neglect probably reflects the fact that it has been much easier to study criminals than noncriminals, for criminals may be studied conveniently when they are in custody or under supervision. Noncriminals are more difficult to study, as a rule, and ex-criminals are most difficult (for they seek to hide their past); yet, studying these people may be essential for a more useful understanding of crime. Thus, the most available applications of Sutherland's theory make it appear to be merely the old enculturation explanation for crime, even though its abstract formulation suggests that it might also be a frame of reference for theoretically connecting correlated conditions with specific crimes and for the analysis of noncriminal behavior and correctional processes.

IV

RECENT THEORETICAL EMPHASIS

No more adequate general theory of crime causation has replaced differential association. Several recent developments, however, suggest some of the ways in which such a theory would modify the heritage from Sutherland. The criminology which now seems to be emerging in sociology is one focused on change and operating with a more complex conception of the criminal than that involved in earlier theories. These developments reflect long-term trends in general sociological theory, and they are convergent with some new emphases in the other behavioral sciences. Notable among these trends are: (1) attention to all reference groups—not just membership groups—in tracing social influences on individual behavior; (2) the interpretation of motivation as the way in which a person's representation of the behavioral alternatives which he perceives affects his self-conception and his anticipations; and (3) the analysis of cultural differentiation in a structural-functional frame of reference.

By "reference groups," we designate any persons or groups from whose standpoint an individual evaluates himself and others. These include both groups in which he is a member and groups to which he does not belong, but to which he aspires, or which, for other reasons, provide the standpoint from which he views his own situation. The enculturation approach to crime grew out of the study of the influence of groups on the behavior of their members. Reference-group theory helps to account for much of the behavior of individuals who deviate from the expecta-

[14] *Cf.* Glaser, *supra* note 9; GEORGE M. KELLY, THE PSYCHOLOGY OF PERSONAL CONSTRUCTS (1955); A. R. LINDESMITH & ANSELM STRAUSS, SOCIAL PSYCHOLOGY (2d ed. 1956).

tions of their membership groups, for this theory focuses our attention on all of the groups to which these individuals are oriented. The general conditions under which a person is most likely to evaluate his behavior from the standpoint of groups to which he does not belong include: (1) when the other groups have higher status than his own group; (2) when he is an isolate or a failure in his own group; or (3) when change in group affiliation is not strongly counter to the traditions of his society.[15]

While the term "reference group" is fairly new and the analysis of behavior by tracing the influence both of membership and nonmembership groups receives more emphasis now than formerly, such a common-sense idea is by no means completely new. Early students of the gang, while centering their attention on the influence of that group, also noted that most juvenile delinquents drifted out of gang affiliations and became law-abiding members of society in late adolescence and young adulthood if they became interested in marriage or acquired steady employment. The latter interests involve change of reference from their peers exclusively to older persons of legitimate professions and to stable family members.[16] The Tannenbaum and Sutherland enculturation analyses were significant in showing how the transition from enculturation in delinquent gangs to identification with conventional groups becomes unlikely when extensive involvement in criminal groups alienates a youth from conventional circles and increases his ties with professional criminals. Unfortunately, the effects of being caught and prosecuted may be to make criminals the only group to which a youth will aspire. But the task of corrections may be said to be the promotion of noncriminal reference groups; a prisoner is rehabilitated when this promotion is successful.

The study of the *non*delinquent in high-delinquency areas has been undertaken on an extensive basis in recent years by persons of diverse academic background. The outstanding finding, expressed in general terms, is that the youth who avoids extreme enculturation in delinquency, despite extensive contact with delinquents, generally is the youth who maintains strong bonds with a noncriminal family. Reckless sees the influence of noncriminal figures as giving such a youth a conception of himself as "good" which "insulates" him from all situations in which he may be encouraged to be delinquent.[17] This is consistent with psychoanalytic interpretation: the family gives the boy a strong conventional superego—that is, conscience. The problem for criminological theory is to handle adequately the fact that everyone in our society is exposed to multiple influences, some making for criminality and

[15] *Cf.* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE cc. 9 and 10 (2d ed. 1957); Turner, *Role-taking, Role-standpoint and Reference Group Behavior*, 61 AM. J. SOCIOLOGY 316 (1956), reprinted in L. A. COSER & B. ROSENBERG, SOCIOLOGICAL THEORY 272 (1957).

[16] *Cf.* W. F. WHYTE, STREET CORNER SOCIETY (1943).

[17] *Cf.* Reckless, Dinitz, & Kay, *The Self Component in Potential Delinquency and Potential Non-Delinquency*, 22 AM. SOCIOLOGICAL REV. 566 (1957); S. & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY 281 (1950). One of the most sophisticated analyses of the extent of family influence on delinquency is Jackson Toby's statistical analysis of court and census data, *The Differential Impact of Family Disorganization*, 22 AM. SOCIOLOGICAL REV. 505 (1957).

some making for conventionality, some from membership groups and some from perceived groups in which one is not a fully-accepted member. An understanding of behavior change, from noncriminal to criminal and viceversa, requires a theory of behavior which accounts for human inconsistency and, therefore, permits some prediction and control of the range of this inconsistency.

Several preliminary explorations and formulations of a theory of behavior change and inconsistency have been undertaken by sociologists in terms of analysis of motivation and decision-making in individual behavior. One of Sutherland's students, Cressey, posed a crucial problem for differential association theory: How does one explain the conduct of persons who reach adulthood as highly conventional persons and, therefore, are placed in positions of financial trust, but suddenly violate such trust by embezzlement? Cressey's interviews with 133 embezzlers and his examination of life histories on over 200 other cases of embezzlement led him to an explanation which seemed to fit every case.[18] He found, first, that trusted persons committed embezzlement only when faced by a financial problem which they could not divulge to others. Nevertheless, he found that in spite of need and opportunity for the crime, the offense was never committed until the embezzler had developed a rationalization which legitimated the offense to him. When frustrated humans perceive a solution to their problems, they seem unable to grasp the solution until they can represent it to themselves in such a manner as to permit them to maintain a favorable conception of themselves. In Cressey's cases, differential association in terms of membership affiliations rarely seemed to explain this reinterpretation of criminal behavior. A shift of perspective, often by taking the standpoint of new reference groups, was needed to change the trustworthy person into an embezzler.

In view of the evidence that most delinquent youth have some acceptance of conventional values, Gresham M. Sykes and David Matza suggest that delinquents must "neutralize" their conventional ties and moral scruples before they can commit delinquency.[19] They illustrate as common "techniques of neutralization" a variety of rationalizations, such as blaming the theft on pressures from bad parents or on misfortune, defining the victim as a worthless person who deserves to be victimized, justifying the offense in terms of loyalty to a friend, or noting the faults of those who condemn the delinquency. The process of rationalization reconciles crime or delinquency with conventionality; it permits a person to maintain a favorable conception of himself, while acting in ways which others see as inconsistent with a favorable self-conception. In this analysis of motivation by the verbal representation of the world with which a person justifies his behavior, sociologists are con-

[18] DONALD R. CRESSEY, OTHER PEOPLE'S MONEY (1953).

[19] Sykes & Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIOLOGICAL REV. 664 (1957). These authors, unfortunately, neglect the influence of delinquent subcultures in transmitting and reinforcing these very techniques of neutralization which permit delinquents to adhere simultaneously to delinquent and nondelinquent cultures. Thus, these authors may exaggerate the incompatibility of their views with those propounded in ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG (1955).

verging with many psychologists.[20] This seems to be individualistic analysis of behavior, but the so-called "symbolic interactionists" viewpoint is gaining acceptance, and its sees individual human thought as essentially a social interaction process: the individual "talks to himself" in thinking and reacts to his own words and gestures in "working himself" into an emotional state in much the same manner as he does in discussion or in emotional interaction with others.[21]

Simultaneously with such reconceptualization of individual mental processes in crime, sociologists at midcentury tried to formulate theories of cultural change which would account for the development of criminal and delinquent subcultures within the predominant culture of a society. Some criminology textbooks, notably that of Donald R. Taft, attacked this problem by tabulating every feature of American culture which appeared to be conducive to crime. The features stressed included materialism, impersonal social relations, loyalty to restricted groups, survival of frontier values, and lack of objectivity in viewing crime.[22]

A more abstract way of analyzing social and cultural differentiation has been growing in anthropology and sociology. It is known as the "structural-functional approach," its adherents often are called "functionalists," and it is applied to any aspect of the culture of any society. This whole approach, which is related to functionalism in legal theory, cannot adequately be summarized here, but it may be well to discuss some of the systematic theorizing relevant to crime set forth by Professor Robert K. Merton, of Columbia University, a leading functionalist theoretician and one of the world's foremost sociologists.[23]

Merton revived the term *anomie* as a designation for the condition of weakened cultural regulation of behavior. Anomie is conceived as developing whenever people are long frustrated in pursuing culturally-prescribed goals by culturally-approved means. Merton suggested that four types of deviant behavior are likely to develop from anomie, briefly as follows:[24]

1. *Innovation* involves preserving the culturally-prescribed goals, but deviating from approved means in pursuing these goals. This would explain the disproportionately high rates of property crime in the lower economic classes, especially among those who are educationally and vocationally handicapped and who are in situations of weak social control over the means used to achieve success. Mutual social support by persons sharing these circumstances promotes development of a criminal subculture among them.

[20] For psychological formulation, see KELLY, *op. cit. supra* note 14. Considerable convergence with the multiple-reference and rationalization analysis of sociologists also is apparent in the psychoanalytic work, FRITZ REDL & DAVID WINEMAN, CHILDREN WHO HATE (1951).

[21] *Cf.* LINDESMITH & STRAUSS, *op. cit. supra* note 14; ANSELM STRAUSS, THE SOCIAL PSYCHOLOGY OF GEORGE HERBERT MEAD (1956); GEORGE H. MEAD, MIND, SELF, AND SOCIETY (1934).

[22] DONALD R. TAFT, CRIMINOLOGY (3d ed. 1956).

[23] For a general summary of the structural-functional approach, see MERTON, *op. cit. supra* note 15, c. 1. The relationship of functionalism in legal theory to functionalism in other fields is set forth briefly in Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), reprinted in S. I. HAYAKAWA (ED.), LANGUAGE, MEANING, AND MATURITY 184 (1954).

[24] MERTON, *op. cit. supra* note 15, cc. 4 and 5.

2. *Ritualism* is overconformity to culturally-approved means. This does not normally produce criminals; it produces the person who "never sticks his neck out" where regulations are involved. In a dynamic society with continuously-changing problems in every enterprise, such a rigid person may be destined to an unexpected ceiling in income and may be unable to meet unanticipated problems. It seems to the writer that this description characterizes many of the trusted persons whom Cressey studied who suddenly innovated by embezzlement at a late stage in their careers. Perhaps they were caught in financial dilemmas which they could not divulge and which they did not know how to solve legitimately precisely because their prior life had been so ritualistic.

3. *Retreatism* is the rejection both of culturally-prescribed goals and of approved means. Chronic vagrants, drunkards, and drug addicts, who make up the bulk of our jail populations, seem to react to anomie by this pattern of deviancy. Finestone has shown how drug addicts develop a subculture which gives them a sense of superiority from their indifference to conventional standards, so that their "kick" is not an "escape," but an achievement in their perception.[25]

4. *Rebellion* involves partial or complete innovation of goals *and* means. In juvenile delinquents who still are supported by their parents, so that economic need is not a major motivation to crimes against property, one notes that the goal of independence from conventional authorities becomes a major alternative to conventional success goals. This accounts for the apparently senseless destruction of property by delinquents, their theft of goods which they do not intend to use, and their nonspecialization in deviant behavior (deviancy for deviancy's sake). Cohen has provided us with a brilliant analysis of the development of delinquent subcultures with such norms of deviancy among lower-class male youth who share handicaps in meeting the expectations of our schools.[26] Unfortunately, this portrayal does not illuminate the transition from rebellious delinquency to professional criminality. Such an extension might result from closer articulation of Cohen's work with Merton's theory and with Sutherland and Tannenbaum's analysis of the professionalization of criminals.

The validity of the foregoing theory will be suggested by the fruitfulness of the research which it stimulates. Systematic research can lead to refinement of the theory and can give the theoretical concepts a more precise empirical reference. Even in their present state of development, however, these concepts seem to the correctional sociologist to be much less vague, much more relevant, and a great deal more testable than the concepts of those correctional psychologists who persist in neglecting the extrafamilial social relationships of criminals.

It is noteworthy that research guided by the types of theorizing described in this part is occurring not so much in criminology as in other areas of sociological study,

[25] Finestone, *Cats, Kicks, and Color*, 5 SOCIAL PROBLEMS 3 (1957); *Narcotics and Criminality*, 22 LAW & CONTEMP. PROB. 69 (1957).

[26] COHEN, *op. cit. supra* note 19; see also Toby, *Social Disorganization and Stake in Conformity*, 48 J. CRIM. L., C. & P.S. 12 (1957).

as well as in psychology and in social and cultural anthropology. Indeed, similarity of theory has resulted in the merger of instruction in these several fields into single departments of "social relations" at Harvard and at Johns Hopkins Universities; elsewhere, these disciplines have joint curricula; and everywhere, they are developing a common literature. Quarrels over proprietary rights to criminology are likely to diminish if the claimants merge into a single behavioral science. And it is the writer's impression that interdisciplinary communication and fusion occurs most successfully when the representatives of the several disciplines collaborate in research on practical problems rather than in discussion of abstract theoretical issues. Such practical research involving sociologists is developing in several fields of law enforcement and corrections.

V

SOCIOLOGICAL STUDY OF THE ADMINISTRATION OF JUSTICE

An understanding of change and inconsistency in the behavior of people called criminal is likely to be gained most effectively in conjunction with research on the influence of prison, parole, and probation, since these are programs designed to change people. Research on such programs, however, necessarily involves the sociologist not only in abstractly explaining criminality, but in analyzing the entire social organization and function of law enforcement, judicial, and correctional agencies. In this connection, sociologists are interested not only in the manifest features of these enterprises, but also in their unofficial practices and unintended consequences.

A general sociology of administrative organization and a sociology of the professions have been growing rapidly in recent decades. Application of the theory and the research techniques developed in these fields to the study of police, court, and prison organization is just beginning. Unfortunately, the police and the courts have been particularly resistant to study, preferring to keep the social relationships and pressures affecting their work out of the picture which the public has of them, and even out of their conscious conception of themselves.

A study by William A. Westley brought out the effects on police behavior of the pressures to make arrests leading to convictions in felony cases.[27] Interviews indicated that the police see such arrests as the major factor in public esteem of the police and as a primary factor in a policeman's chance for rapid promotion. This leads police to legitimize almost any means to secure felony convictions. Acceptance of illegal use of violence as an interrogation technique was especially supported by the policemen studied, particularly where the arrestees were of low social esteem, such as members of minority groups, vagrants, and, especially, alleged sex offenders. But public reactions to some use of violence leads to a defensiveness among policemen. Even those who did not use illegal violence extensively reported that they

[27] Westley, *Violence and the Police*, 59 AM. J. SOCIOLOGY 34 (1953); *Secrecy and the Police*, 34 SOCIAL FORCES 254 (1956).

would be secretive about violence committed by their colleagues, feeling that any exposure would jeopardize the status of all policemen and would lead to reprisals against them by their colleagues. The research indicates the operation of an informally-communicated and enforced code of behavior in the police profession (as in many professions) which directly contradicts official regulations in many respects. Much of it may also work at cross-purposes with parole, probation, and the courts. More research, already begun, may provide and validate a fuller picture of these unofficial understandings and of the extent to which they are altered by various types of police administration and training.

The sociological study of judicial organization and procedure is now occurring on a more extensive basis than ever. With strong initial impetus from the late Supreme Court Justice Robert H. Jackson, and with considerable financial backing from the Ford Foundation, numerous large-scale research projects have been instituted in the last five years by the American Bar Foundation, the American Law Institute, and several universities. Sociologists are working with lawyers and other specialists in studying the operation of criminal courts and in drafting model legislation to correct the deficiences which they find. Unfortunately, few publications are available yet on the results of these undertakings.

Arthur L. Wood's interviews with over a hundred criminal lawyers and with a like number of civil lawyers provided a picture of the extent to which informal contacts lead to settlement of criminal cases outside the courtroom.[28] They also indicated the reasons for this situation. It was shown that strains result from the conflict of the adversary system, the necessity for friendship with the prosecution in order to build a criminal law practice, and the fact that criminal clients are to be served, even though they generally are guilty of some offense. The criminal lawyer resolves these strains by trying to provide some service to the criminal, without successfully defending him against all charges. Thus, "deals" outside of courts are inevitable consequences of the social structure in which the criminal law profession operates and do not necessarily reflect immorality in any of the participants. Nevertheless, this situation facilitates the operations of any participants who happen to be interested in what would generally be regarded as unethical practice.

The research on the jury at the University of Chicago Law School has received much publicity as a consequence of the controversy aroused when judicial permission was received to record secretly the deliberations of juries. Most of the research actually utilized mock trials, based on the public records of actual trials, with experimental juries recruited from actual venire lists. Techniques for recording and analyzing interaction developed in small-group sociology have been applied to analysis of the jury decision-making process. In addition, public opinion polls have been conducted to see how people decide a case after receiving different types of

[28] Wood, *Informal Relations in the Practice of Criminal Law*, 62 AM. J. SOCIOLOGY 48 (1956). See also Newman, *Pleading Guilty for Considerations*, 46 J. CRIM. L., C. & P.S. 780 (1956); Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

instruction from the judge, such as instructions based on the *M'Naghten* rule[29] on insanity and instructions based on the *Durham* decision.[30] Most of the findings are still to be published. The reports available indicate such things as the greater influence of men than women in determining the jury's verdict; incredible as it may seem, the average male juror talks much more than the average female juror. Also, proprietors and professional people tend to dominate the discussions carried on by occupationally-mixed juries, which may partially compensate for the greater frequency with which they can manage to be excused from jury service.[31]

Five or ten years hence, when the results of current research are more fully reported, we should have several times as much well-validated knowledge on the actual operation of our law enforcement machinery as we now have. This will continue to be a major area of opportunity for sociological research, for there have been little more than conflicting claims and impressions on the facts relevant to proposals for legal reform. New knowledge will raise further issues and call for additional research. Surely, further breakdown of police and judicial resistance to objective study will enhance the possibility of improving our law enforcement and administration machinery.

VI

THE PRISON AS A SOCIAL SYSTEM

Lloyd E. Ohlin has summarized and analyzed the accomplishments and possibilities of sociological research in prisons so concisely and cogently that it hardly seems appropriate to do more here than reiterate a few of his conclusions. As he puts it:[32]

> The penal system . . . provides an opportunity for controlled sociological observation and comparative analysis which is very much needed from a practical and theoretical standpoint in criminology. It provides a unique opportunity for sociologists to test sociological theories, and to refine and develop them in the context of the correctional setting.

Unfortunately, the subjects who are so readily available for research because they happen to be incarcerated have been studied primarily to procure information on their life prior to incarceration. The prison itself, a relatively closed social system, has not received the study it merits. Most writing on what goes on in prison is impressionistic, moralistic, superficial, or very obviously biased, rather than systematic, objective, and guided by firmly established behavioral science theory.

The most comprehensive published study of the prison as a social system still is the only published book-length study, Donald Clemmer's *The Prison Community*.[33] What Clemmer did, essentially, was to apply the elementary sociological

[29] *Cf.* M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

[30] Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[31] Strodtbeck, James, & Hawkins, *Social Status in Jury Deliberations*, 22 AM. SOCIOLOGICAL REV. 713 (1957); Strodtbeck & Mann, *Sex Role Differentiation in Jury Deliberations*, 19 SOCIOMETRY 3 (1956).

[32] LLOYD E. OHLIN, SOCIOLOGY AND THE FIELD OF CORRECTIONS 12 (1956).

[33] DONALD CLEMMER, THE PRISON COMMUNITY (1940).

concepts and research techniques of twenty-five years ago to the prison in which he was employed. The result is a picture of the distinctive culture of a prison and of how it is transmitted, as well as a portrayal of prison cliques and classes and their impact on their members.

Sociological publications on prisons since Clemmer have been fragmentary in scope, though often based on longer unpublished theses. One of the most brilliant, that of Richard H. McCleery, won a 1957 national award of the American Political Science Association. McCleery analyzed the relationship between authority and communication in a prison over a ten-year period in which the prison program changed from autocratic repression to democratic retraining. The autocracy was characterized by flow of communication downward only, with power and information in the staff strictly hierarchical. McCleery, Ohlin, and others have shown how, in such a prison, informal organization among inmates achieves some autonomous power by restricting communication between inmates and staff. This tends to prevent sincere involvement of inmates in treatment programs and creates pressure on inmates to conform to the criminal subculture of their fellow convicts. Inmate leadership centers in "old cons" with alleged maximum access to information in the prison. These unofficial inmate leaders achieve more authority and freedom of action than other inmates because advantages are granted to them by custodial personnel, and they, in turn, help get inmates to conform to the major requirements for order and security in the prison.[34]

Democratization of the prison, which was studied by McCleery, involved alteration of communication channels by increasing the size and power of the treatment staff, by encouraging direct communication between inmates and staff, and by granting appreciable influence to an elected inmate council. At first, these changes were followed by some anarchic disorder led initially by former inmate leaders who resented their loss of status and later by "young toughs" no longer kept "in line" by the old cons. Ultimately, stabilization of the prison on the new basis was achieved when inmates and staff were won over to more full support and utilization of the new communication channels.

There is need for more analysis of both prescribed and actual practices in prison, based on systematic study of the expectations maintained by various categories of inmates and employees. L. W. McCorkle and R. R. Korn have called our attention to the way conflicting expectations lead to restriction of output in prison industry; and with Ohlin, they have also indicated the dilemmas encountered by various personnel in corrections.[35] Modern American sociology has acquired extensive information on

[34] RICHARD H. MCCLEERY, POLICY CHANGE IN PRISON MANAGEMENT (Michigan State University Political Research Studies No. 5, 1957). See also Schrag, *Leadership Among Prison Inmates*, 19 AM. SOCIOLOGICAL REV. 37 (1954); Grosser, *The Role of Informal Inmate Groups in Change of Values*, 5 CHILDREN 25 (1958); Sykes, *The Corruption of Authority and Rehabilitation*, 34 SOCIAL FORCES 257 (1956); RICHARD MCCLEERY, THE STRANGE JOURNEY (1953); Ohlin & Lawrence, *The Role of the Inmate System in the Institutional Treatment Process*, in NAT'L CONF. ON SOCIAL WELFARE, PROCEEDINGS (1958) (to be published).

[35] McCorkle & Korn, *Resocialization Within Walls*, 293 ANNALS 88 (1954); Ohlin, *The Reduction*

the impact of social-economic class differences on American behavior, but the impact of class background differences on prison social relationships has not been investigated systematically. It has been suggested that change in reference group may be the major factor both in the enculturation of individuals into crime and in their rehabilitation. Richard A. Cloward has vividly demonstrated this enculturation in a military prison.[36]

The limitations of administrators who are not research-oriented were clearly evident in the pronouncements which followed the wave of prison riots in 1952-53. Using the simple rule that anything evil must be caused by everything evil in its setting, all traditional complaints were listed as causes of riots: overcrowding, poorly-trained personnel, inadequate funds, political influence, and so forth. A comparison of state prisons quickly demonstrates that these conditions did not differentiate prisons in which riots occurred from riot-free prisons. Sociologists have suggested explanations in terms of the inmate leadership's loss of advantages in changing prisons and have adduced evidence that discrepancy between precept and practice, rather than poorer conditions, differentiated the riotous from the nonriotous prisons.[37] Much more theoretical analysis and systematic research is needed in this area, but we shall not enhance knowledge by a mere rehashing of old complaints without investigating their relevance.

Currently, sociologists are engaged in two large-scale research projects on correctional communities, both financed by the Ford Foundation. Under the direction of Professor Lloyd E. Ohlin, of the New York School of Social Work, Columbia University, diverse types of juvenile training schools are being compared in terms of their effects on delinquents, and experimental alterations of their programs are being initiated and evaluated. Also, a four-year program of research on the effectiveness of the federal prison system has been initiated at the University of Illinois under the writer's direction. Several universities, notably Ohio State, Iowa, Wisconsin, and Washington, are sponsoring numerous thesis research programs by sociologists in state prisons. Prospects are that from these efforts will come a much more adequately validated knowledge than we now have on the effects of different types of prison programs on various types of prisoners.

VII

PREDICTION RESEARCH

All of the trends in sociological research on corrections cannot be covered here, but before concluding, one type of research of tremendous potential significance for

of Role Conflicts in Institutional Staff, 5 CHILDREN 65 (1958); Ohlin, Pivin, & Pappenfort, *Major Dilemmas of the Social Worker in Probation and Parole*, 2 N.P.P.A.J. 211 (1956).

[36] RICHARD A. CLOWARD, SOCIAL CONTROL AND ANOMIE: A STUDY OF A MILITARY PRISON (1958). See also HELEN WITMER & RUTH KOTINSKY, NEW PERSPECTIVES FOR RESEARCH ON JUVENILE DELINQUENCY (U. S. Children's Bureau, Dep't of Health, Education, and Welfare, Pub. No. 356, 1956).

[37] Hartung & Floch, *A Social Psychological Analysis of Prison Riots: An Hypothesis*, 47 J. CRIM. L., C. & P.S. 51 (1956); LLOYD E. OHLIN, SOCIOLOGY AND THE FIELD OF CORRECTIONS 22 (1956).

theory and practice in dealing with crime should be mentioned. This is analysis of the outcome of judicial and correctional decisions in terms of their statistical significance for actuarial prediction.

The comparison of judges and physicians is appropriate whenever judges justify their behavior as crime prevention, rather than as abstract balancing of crime and punishment in fulfilment of transcendental ethical imperatives. The lack of research on the effectiveness of some medical treatments is deplored by physicians, but research on the effectiveness of judicial and correctional prescriptions is like a speck of dust against a mountain when compared with research on the effectiveness of medical prescriptions. In most jurisdictions, a great inconsistency from one judge to the next is known to exist, but its magnitude is seldom objectively tabulated, nor are the long-run consequences of alternative sentencing, classification, and parole policies ever determined in terms of criminal recidivism.

Sociologists, and Sheldon and Eleanor T. Glueck among nonsociologists,[38] pioneered the type of research design which is needed to provide a scientific basis for judicial and correctional decisions. This is the prediction design. It never will provide with absolute certainty the ideal decision for each offender, no more than medical research permits certain decisions for all cases. Indeed, one should not anticipate achieving in judicial or correctional decisions the average level of predictive certainty achieved in medicine. Certainty in both fields is increased, however, by research which strives for an objective marshaling of relevant experience for each type of case or situation with which a decision-maker may be confronted. Essentially, such research consists of developing the most reliable and predictive procedures possible for classifying criminals (diagnosis), and tabulating the rates of success or failure for alternative treatments of each diagnostic category. In criminology, as in medicine, prediction or "clinical" research is designed in accordance with findings of "basic" research or theory on the causes of the conditions to be treated. Such prediction or clinical research, however, is justified not only for its great practical value, but also as a crucial way of testing many propositions of "pure" science, such as theories of etiology.

The pioneer work of Ernest W. Burgess led to numerous parole and probation prediction studies by sociologists based on analysis of available records.[39] These undertakings were severely limited by the paucity of data with which they worked, the necessity for restriction of samples to the already selected parolees or probationers, the lack of access to central fingerprint registries for long-run follow-ups on recidivism, and the primitive weighting systems with which the predictive information was combined. A major advance in the scientific basis for judicial decisions

[38] See, *e.g.*, Glueck, *Predictive Devices and the Individualization of Justice*, 23 LAW & CONTEMP. PROB. 461 (1958).

[39] Schuessler, *Parole Prediction: Its History and Status*, 45 J. CRIM. L., C. & P.S. 425 (1954); Garrity, *Statistics for Administrative and Policy Decisions*, Cal. Youth Authority Q., no. 3, 1957, p. 40; *id.* no. 4, 1957, p. 33; LLOYD E. OHLIN, SELECTION FOR PAROLE (1951); *cf.* Burgess, *Factors Determining Success or Failure On Parole*, in BRUCE A. ANDREW ET AL., THE WORKINGS OF THE INDETERMINATE SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS 221 (1928).

in the United States will only be possible when information on felony recidivism, now recorded with an adequate completeness by the F.B.I., is made available for criminological research. Elsewhere, the writer has outlined a program for accomplishing this.[40] In the meantime, the actuarial risk for standard types of decision may be calculated by research in those correctional systems which maintain highly complete records, including postrelease data on felony cases.

The reduction of weeks of calculation to minutes through the use of modern large-scale digital computers should permit development of more rational systems for combining statistical information than that provided by the traditional Burgess and Glueck systems of assigning additive scores to each predictive factor. A shift from additive weighting to multivariate analysis which identifies the most independently predictive *clusters* of attributes in a criminal may greatly enhance: (1) the accuracy of prediction; (2) the theoretical importance of prediction research for criminology; and (3) the ease with which prediction research findings may be understood and accepted as significant for judicial and correctional policy.

VIII

CONCLUSIONS

Three general conclusions manifest themselves from our survey of the sociological approach to crime and corrections. These are:

First, sociologists have successfully discredited all purely individualistic explanations for crime. A consequence of the debates of the past is that many of the members of formerly individualistic disciplines now stress cultural influences and interpersonal relations in analyzing the behavior of criminals and delinquents. Some of the best sociology now is being developed by psychologists and psychiatrists, in criminology and in other fields. This trend is likely to grow as the boundaries between sociology, psychology, anthropology, political science, psychiatry, and psychoanalysis become more loose (as have the boundaries between chemistry, physics, and the biological sciences).

Secondly, developments in the study of crime and corrections follow, but lag somewhat behind, developments in general behavioral science theory and research. Major contributions to criminology are those which markedly reduce this lag. Good criminology is good behavioral science; poor criminology reflects poor behavioral science.

Thirdly, there has been continuing interaction and cross-fertilization between the abstract explanation for crime and the analysis and evaluation of correction and crime-prevention programs. Any judicial or correctional policy which is based on a seriously invalid conception of the behavior of the persons whom it involves is likely to do much more damage than benefit. Any judicial or correctional policy which is not modified on the basis of significant advances in behavioral science is

[40] Glaser, *Released Offender Statistics: A Proposal for a National Program*, 19 AM. J. CORRECTION 15 (1957); *Criminal Career Statistics*, in AM. CORRECTIONAL ASS'N, PROCEEDINGS 103 (1957).

likely to stagnate or deteriorate. The prospect of a rapid increase in applied research in the courts and in correction, as well as in noncriminological areas of social research, means that abstract criminology is likely to be refined and sharpened a great deal in the decades ahead. It will be difficult, but it will be important, that all of us keep up with new developments.

A CRITIQUE OF THE SOCIOLOGICAL APPROACH TO CRIME AND CORRECTION

FRANK E. HARTUNG*

I

It is difficult for a sociologist to write a critique of his own discipline's approach to crime and correction. First, it is evident to all who know the field that sociology is not a unitary discipline. It can, thus, neither be praised nor condemned as a whole, and it is necessary to specify what kind of sociology is being lauded or derogated. Second, sociologists seem to agree on hardly anything except loyalty to their common field, and there is a widespread belief among them that many of them are actually subverting sociology. It will be seen that criminologists are so free in destroying and rejecting each other's theories and hypotheses that criminology must appear nihilistic to the outsider. Third, there is dispute concerning both the legitimate limits of the discipline and what common sociological principles are. As to its limits, some sociologists have surrendered to the imperialistic claims of biology, psychiatry, psychoanalysis, and psychology. In so doing, they have deprived themselves of any logical basis for their own intellectual and professional existence. Other sociologists, it will be seen, have rejected the claims of other disciplines to criminology and have asserted their own imperialism. In so doing, they have finally joined battle with psychiatry, which, under the aegis of an irrationalist psychology, laid claim in the fourth quarter of the nineteenth century to the entire domain of human behavior and society. The two main criminological contenders today are the irrationalist psychology of psychiatry and the social psychology of sociology.

It would be difficult, and likely impossible, to obtain agreement among the members of the American Sociological Society to any proposed set of sociological principles or propositions. This returns us to the first point—namely, that sociology is not a monolithic structure. In 1929, Read Bain referred to the attempt by Albion Small, in 1907, to state the agreements then existing among sociologists. There was considerable disagreement at that time with Small's points. Bain said that he would not accept more than four or five of Small's twenty points. In presenting his points in 1929, Bain said that he had "little faith" that even a majority of sociologists would agree with them. The amount of agreement with them in twenty years, he continued, "may well be less than my present agreement with Small."[1] He was correct.

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[1] Bain, *Trends in American Sociolgical Theory*, in GEORGE A. LUNDBERG, READ BAIN, & NELS ANDERSON (EDS.), TRENDS IN AMERICAN SOCIOLOGY 105 (1929).

It is necessary, in order to make the rationale of this critique evident, to formulate some of the sociological principles on which it is based. This will help to indicate the kind of sociology that characterizes this study, as well as something of the viewpoint from which the studies cited in this article are evaluated. There is no claim that these nine propositions would receive the assent of a simple majority of sociologists; they do, however, represent its historically-dominant viewpoint:

1. Society and culture are real and have produced habits of action, thought, and feeling which form a body of phenomena with principles of its own.
2. The cultural habits of a society pre-exist with respect to its individual members, so that the individual social behaviors must be referred to the cultural forms.
3. All knowledge is inferential and symbolic (linguistic), rather than intuitive.
4. The self is without residue a product of sociocultural experience.
5. Human observation (perception) is a cognitive process in which the individual first interprets and then acts.
6. Sociocultural values and habits are primary in human conduct.
7. The psychoanalytic unconscious is a postulate, and not a psychological element.
8. Symbolic behavior is purposive.
9. The individual develops an organization of roles in a process of symbolic communication.

II

The above nine propositions are by no means the only ones on which this critique is based, but they are all relevant to the following evaluation of sociological works. They are drawn from the social-psychological school known as symbolic interaction. Even though it would not, perhaps, be possible to muster a simple majority in favor of these propositions, there are occasions on which sociologists can unite—and this exemplifies the sociological principle that attacks from an external enemy tend to unite an in-group that is at conflict within itself.

An instance of partial sociological unity was produced by the publication of the Gluecks' *Unraveling Juvenile Delinquency*.[2] All but one of the published sociological reviews or articles read by this writer were more or less highly critical. Ernest W. Burgess stated that its two outstanding limitations are:[3]

> (1) the failure on two crucial points in matching the delinquents and the nondelinquents and (2) the one-sided interpretation of the findings.

Burgess accused the Gluecks of the failure to utilize the most significant of their findings, which show the gang membership of the delinquents and the absence of such affiliation by the nondelinquents, and of looking for the basic explanation of delinquency in inherited tendencies and in a personality structure that is allegedly formed before the child enters school.

Clinard stated that their work is deficient in the knowledge and application of

[2] SHELDON & ELEANOR T. GLUECK, UNRAVELING DELINQUENCY (1950).
[3] Burgess, Book Review, Fed. Prob., March 1951, pp. 52, 53.

contemporary social-psychological theory concerning human behavior. He indicated the fact that the Gluecks ignored their own finding that almost all of the delinquents were members of gangs and that only three of the nondelinquents belonged to gangs. He also called attention to the Gluecks' possible inversion of cause and effect: are delinquents aggressive because they are delinquent, or are they delinquents because they are aggressive?[4]

Some students criticized the Gluecks for their use of the as yet unvalidated Rorschach technique. Lois-ellin Greene Datta disagreed with their use of this technique, but upon a different ground. Mrs. Datta's position is that the Rorschach test has been validated as an index of personality structure and content. Her objection to its use by the Gluecks is that its[5]

> . . . isolation from other subject-variables in the Gluecks' research seemed more designed to test the Rorschach's validity than to discover variations between delinquent and nondelinquent boys. . . . [Mrs. Datta's] objection is emphatically to the patchwork statistics imposed upon both Rorschach and Wechsler-Bellevue techniques. The Rorschach especially is a holistic technique: the *entire pattern* of responses is what is significant, not one response factor alone. There is no experimental, let alone logical, basis for [computing] correlations between isolated factors, e.g., "c" and "f" of Rorschachs. This particularistic factor splitting, so far as . . . [Mrs. Datta] is concerned, destroys any significance which the Rorschachs might have had in this [*Unraveling Juvenile Delinquency*] study.

Attention has briefly been called to three points by Hartung, in a review of *Physique and Delinquency*,[6] the Gluecks' latest book to be based upon material gathered for and presented in *Unraveling Juvenile Delinquency*. First, their statistical manipulations in *Physique and Delinquency* are questionable. These are presented in 109 tables and were performed in an effort to ascertain which traits and factors supposedly exert a significant differential influence on the delinquency of four bodily types (mesomorphic, endomorphic, ectomorphic, and balanced), and which do not. None of the 109 tables deals with the entire sample of delinquents and nondelinquents. There are at least forty-six tables in which the number of delinquents, or controls, or both, is less than 100. In table fifty-nine, for example, the number of nondelinquents is twenty-seven, with the four types having, respectively, four, fifteen, eight, and zero representatives! Second, the Gluecks repeat explicitly one reason why criminologists were skeptical of their claim in 1950 to be able to predict delinquency as early as the sixth year—namely, proof is lacking of the permanence and immutability of the somatotype.[7] Third, the Gluecks ignore a fundamental social-psychological problem—namely, personality is so undeveloped at the age of six years that it is not possible to predict, better than chance, what later choice of models for behavior will be made by a boy.

[4] Clinard, Book Review, Fed. Prob., March 1953, p. 50; *The Sociology of Delinquency and Crime*, in JOSEPH B. GITTLER (ED.), REVIEW OF A DECADE 480 (1957).

[5] LOIS-ELLIN GREENE DATTA, SOCIOLOGICAL THEORY IN CONTEMPORARY AMERICAN SOCIOLOGY 28 (unpublished thesis in University of West Virginia Library 1955).

[6] Hartung, Book Review, 48 J. CRIM. L., C. & P.S. 638 (1958).

[7] SHELDON & ELEANOR T. GLUECK, PHYSIQUE AND DELINQUENCY 256 (1956).

In an interesting analysis of the Gluecks' data, Reckless rearranged the 107 factors that the Gluecks employed in order to ascertain which factors are statistically associated with delinquency and nondelinquency.[8] He arranged his table into three groups: situational, individual, and intermediate factors. Reckless' table showed that the statistical association of the situational factors is much greater than that of individual factors to delinquency and nondelinquency. This finding is at considerable variance with the Gluecks' interpretation of their data, an interpretation that they incorporated into their "causal law." Reckless' analysis, of course, directly called into question the validity of that "causal law." Reckless also called attention, as did Burgess and Clinard, to the fact that the Gluecks' data on gang membership for delinquents and its absence among nondelinquents, tends to confirm Sutherland's theory of differential association, of which Sheldon Glueck has been an arch-opponent.[9]

Reiss analyzed, among other things, the theory and design of *Unraveling Juvenile Delinquency* and found that the Gluecks' conclusions were not the result of a systematic attempt to test a series of hypotheses about the etiology of delinquency. Since their study was eclectic and not guided by any theory, their interpretations of their findings were necessarily ex post facto. Reiss also showed that the two groups in the study were poorly matched on neighborhood and environmental factors, and that the study largely ignored the influence of primary groups in guiding behavior and in enforcing conformity to sets of norms.[10]

Rubin found illusions in the plan of *Unraveling Juvenile Delinquency* in its method, its findings, and the interpretation of its data. He found two outstanding facts to emerge from the study: First, although the Gluecks sought steadfastly to eliminate environmental influences, the great influence of social causation proved to be irrepressible in their data. Second, institutionalized children differ from children who have not been institutionalized.[11]

Sellin concluded that the Gluecks' conception of cultural conflict was inadequate.[12] Taft found the work inadequate in several respects: First, the Gluecks did not show—as they claimed—that family tensions are the deepest causes of delinquency. Second, the delinquents and nondelinquents were paired in the neighborhood by physical proximity only. Because of this neglect of social influences in the neighborhood, it is not possible to accept the Gluecks' claim that the two groups in the study were actually paired by identical social influences of the neighborhood.[13]

Vold has called attention to the very great amount of overlapping between the de-

[8] WALTER C. RECKLESS, THE CRIME PROBLEM 75 (2d ed. 1955).

[9] *Id.* at 77.

[10] Reiss, *Unraveling Juvenile Delinquency, II. An Appraisal of the Research Methods*, 57 AM. J. SOCIOLOGY 115 (1951).

[11] Rubin, *Unraveling Juvenile Delinquency, I. Illusions in a Research Project Using Matched Pairs*, *id.* at 107, 113.

[12] Sellin, Book Review, 41 J. CRIM. L. & CRIMINOLOGY 737, 738 (1951).

[13] Taft, *Implication of the Glueck Methodology for Criminal Research*, 42 J. CRIM. L., C. & P.S. 300 (1951).

linquents and nondelinquents in respect to many of the factors considered by the Gluecks. The latters' data are far from revealing any clearly-delineated differences between the personalities of delinquents and nondelinquents. When the two groups are compared as to the extent and type of mental pathology as summarized in the psychiatric diagnoses based on Rorschach data, the similarities of the two groups are very striking. There is comparatively little indication of differences. This is also true of the ten "traits of basic character structure" listed by the Gluecks. For anyone who wishes to develop a logical theory of personality or of "individual factors" as being basic in the causation of crime or delinquency, these similarities are likely to be confusing. The "deviant" personality, Vold thus showed, is limited strictly to relatively obscure statistical findings in terms of probability; otherwise, delinquents and nondelinquents are much more alike than different.[14]

Edwin H. Sutherland may be said to have entered the lists against *Unraveling Juvenile Delinquency* in advance. He began his career as a criminologist largely in the role of a critic.[15] By the unhappy chance of his untimely death, his last published writing was a critical appraisal of William H. Sheldon's *Varieties of Delinquent Youth*.[16] His critiques of Hooton, Sheldon, and the Gluecks indicate that his most trenchant evaluations were directed at projects involving large expenditures of time, money, and energy; and the larger the claims made, the more severe his remarks, if he believed the basic position to be unsound. In reviewing the Gluecks' *Later Criminal Careers,* he treated severely their biological theory of "aging" or "maturation" as being the process that changed the criminal into a lawful person.[17] Although he undertook his usual minute examination of the statistical procedures (which he found quite wanting), his attention was directed to the portion of the Gluecks' study that dealt with mental abnormality. His analysis reveals part of the basis for the sociological conclusion that crime cannot be explained by traits of the individual, as well as some of the reasons for the dissatisfaction with and distrust of psychiatric concepts. Concerning the Gluecks' statistics of mental abnormality, he wrote:[18]

> When [these] data and methods are examined, they are found to be completely untrustworthy. This is the most unreliable part of the book.

Sutherland said of Hooton's two criminological works that the evidence that

[14] GEORGE B. VOLD, THEORETICAL CRIMINOLOGY 128-29, 130 (1958). An English critic said: "If they [the Gluecks] had studied the neighborhood as an entity they would have had to discard the highly developed techniques they had developed for the observation and assessment of series of individuals. But they preferred to shape their problem to the mode required by their instruments—like the ear, nose and throat surgeons of yesterday." Mack, Book Review, 3 BRIT. J. DELINQ. 304 (1953).

[15] ALBERT K. COHEN, ALFRED R. LINDESMITH, & KARL F. SCHUESSLER (EDS.), THE SUTHERLAND PAPERS 270 (1956).

[16] Sutherland, *A Critique of Sheldon's "Varieties of Delinquent Youth,"* 16 AM. SOCIOLOGICAL REV. 10 (1951).

[17] Sutherland, Book Review, 51 HARV. L. REV. 184 (1937). A previously unpublished appraisal which is an extension of the above review is to be found in COHEN, LINDESMITH, AND SCHUESSLER, *op. cit. supra* note 15, at 291.

[18] COHEN, LINDESMITH, & SCHUESSLER, *op. cit. supra* note 15, at 301.

Hooton presented proved nothing at all for the latter's claim that criminals are physically different from lawful persons.[19] Sutherland, in the opinion of some students, was rather lenient in dealing with Sheldon's constitutional psychology. He wrote of it as follows:[20]

> The futility of this study in constitutional psychology should have been obvious in advance from the previous failures of analogous studies. Sheldon adds himself to the list of Lombroso, Kretschmer, Hooton and others who have attempted to demonstrate a physical difference between criminals and noncriminals. *Unfortunately, the administrators of research funds can be seduced into wasting many hundreds of thousands of dollars on such projects even after the results of previous studies have been repeatedly shown not to be worth a nickel.*

The Gluecks, in *Unraveling Juvenile Delinquency,* drew heavily upon Hooton, and their work was praised by him. They also utilized Sheldon's constitutional psychology, both its concepts and techniques. Their latest book, *Physique and Delinquency,* is devoted largely to presenting their Sheldonian data. Sutherland would, therefore, have been interested in the following editorial note in the *British Journal of Delinquency*:[21]

> We hear from Harvard University that the Ford Foundation has made a grant of $200,000 to the Harvard Law School in support of the researches into the causes and treatment of juvenile delinquency conducted under the direction of Professor and Mrs. Glueck. This grant, it is stated, "will enable the Gluecks to accelerate the development and validation of their diagnostic tests designed to reveal early tendencies to delinquency in children."

The above discussion has two constructive purposes; it is not intended merely to illustrate that some sociologists will take issue with those who call into question the legitimate existence of their discipline. Rather, first, it tends to confirm the charge sometimes made against sociologists that they are more skillful in destroying other people's theories, researches, and conclusions than they are at developing their own. It will be seen below that they often deal in no more charitable a fashion with those in their own field. Second, the critical type of discussion listed above is at least just as constructive as it is destructive. This positive aspect of criticism is usually not appreciated. A reading of the sociological discussions of *Unraveling Juvenile Delinquency* will reveal that they make substantive contributions to problems of methodology, the planning of research, the utilization of previous theory and knowledge, and to the development of a unifying or integrative theory of criminology, as well as having implications for logically establishing the limits of sociology and criminology. The last point is another that will be discussed below. In addition,

[19] See Sutherland, Book Review, 29 J. CRIM. L. & CRIMINOLOGY 911 (1939). This review is reprinted in COHEN, LINDESMITH, & SCHUESSLER, *op. cit. supra* note 15, at 273.

[20] Sutherland, *Critique of Sheldon's "Varieties of Delinquent Youth,"* 16 AM. SOCIOLOGICAL REV. 10, 13 (1951). The original version of this paper is published in COHEN, LINDESMITH, & SCHUESSLER, *op. cit. supra* note 15, at 279, 288. (Emphasis added.)

[21] 3 BRIT. J DELINQ. 297 (1953).

a positive conception of the criminal is developed—namely, that of a category of persons who are constitutionally normal, functioning in a normal society.

III

In 1951, Vold wrote that, with the exception of Hooton and a few of his followers, no one today takes seriously the proposition that there are demonstrable physical differences between those who commit crime and those who do not.[22] Vold's statement hardly applies to sociology, and even less to other disciplines. The defection of sociologists from the sociology depicted above can be exemplified with several illustrations.

Weinberg has suggested a shotgun marriage of constitutional psychology and sociology, but without specifying who would hold the gun and who would perform the ceremony. From the individualistic approach, the emphasis would be upon body-type and temperament and several other components. From the group approach, the emphasis would be upon the type of neighborhood and the like. When combined, they would comprise a "unified approach."[23] Weinberg, however, simply ignores a basic problem: How can the constitutional psychology of Hooton, Sheldon, and the Gluecks be "unified" with the social psychology of sociology, especially when the two present mutually-contradictory conceptions of man and theories of human behavior. Weinberg's study reminded Mrs. Datta of the parable of the gentleman who studied all of the available material on philosophy and all of the available material on China, and then wrote a book entitled "Chinese Philosophy" by adding together his two series of notes.[24] To the extent that Weinberg adheres to constitutional psychology, he is logically estopped from claiming that sociology has any legitimate right to its own existence. Sheldon Glueck has very clearly recognized this important point, even if Weinberg has not.[25]

Caldwell is, in some respects, similar to Weinberg. On the one hand, he states that the efforts of Kretschmer, Sheldon, and others to show that bodily build is directly related to type of personality, and through this to crime, have failed.[26] On the other hand, however, he at times openly asserts that biology and heredity enter into criminal behavior; and at other times, he seemingly is unaware that he is propounding biological theories. He is very close to an instinctivist view in his claim that "it is clear" that both competition and cooperation, as well as the other social processes, "have roots in heredity," but that "man's natural tendencies to strive" are greatly influenced by culture.[27] He also writes:[28]

> . . . any theory of criminal behavior must include an examination of the biological and

[22] Vold, *Criminology at the Crossroads*, 42 J. CRIM. L., C. & P.S. 157 (1951).
[23] Weinberg, *Theories of Criminality and Problems of Prediction*, 45 J. CRIM. L., C. & P.S. 421 (1954).
[24] DATTA, *op. cit. supra* note 5, at 48.
[25] S. Glueck, *Theory and Fact in Criminology*, 7 BRIT. J. DELINQ. 92 (1956).
[26] ROBERT G. CALDWELL, CRIMINOLOGY 201 (1957).
[27] *Id.* at 146.
[28] *Id.* at 179.

psychological factors that influence man's receptivity to social influences and his adaptation to social situations.

Caldwell fails to indicate why a sociological theory *must* include biology and psychology. If he means that we could not act as we do were it not for our central nervous system, brain, stereoscopic vision, and so on, his statement is meaningless in the sense that none would disagree with it. But if he means that cultural experience is something *added to* our natural tendencies (whatever may these be?), he is anti-sociological in the sense that he is rejecting the social-psychological analysis of human behavior that has been developed during the past seventy years or so and which is known as symbolic interaction.[29]

Several passages indicate that Caldwell's position is meaningless as defined in the previous paragraph. In discussing his proposition that heredity may be "the major" factor in a criminal as well as a successful business or professional career, he writes that "heredity is a factor in criminal behavior—and an important one—just as it is a factor in all human behavior."[30] Who would argue with this most general statement, and, also, just *how* does this "factor" of heredity become transformed into specific behavior in criminal, business, or professional activities? In discussing the "endocrinological factor," he offers us the facile statement that, ". . . although endocrinology has much to offer, it cannot provide us with a panacea for law violations."[31]

It does seem as if Caldwell is commited to instinctivism, which is another theory of human behavior that sociology has shown to be empirically and logically incorrect. Thus, he writes of the person who is "naturally aggressive."[32] He is also most unsociological in his criticism of the classical school of criminology. That school, he writes, "tended to direct attention from the criminal to the crime, *and thus away from an inquiry into the causes of crime.*"[33] The sociological position is, of course, that since crime is a sociocultural phenomenon, it is necessary to study it socioculturally in order to understand it.

That Caldwell's position is individualistic is shown in his praise of Lombroso. He writes that Lombroso "clearly" showed that we must "look beyond" crime and study the criminal if we want to learn the causes of criminal behavior.[34] What

[29] Cooley, *Genius, Fame, and the Comparison of Races*, 9 ANNALS 317 (1897), reprinted in CHARLES H. COOLEY, SOCIOLOGICAL THEORY AND SOCIAL RESEARCH c. 3 (1930).

[30] CALDWELL, *op. cit. supra* note 26, at 196.

[31] *Id.* at 203. Hoskins, an outstanding research endocrinologist, is more modest about his field than Caldwell is: "Before psychology, sociology, and criminology can be convincingly rewritten as merely special aspects of endocrinology, many more facts than are now available will have to be collected and integrated. R. G. HOSKINS, ENDOCRINOLOGY 348 (1941).

[32] CALDWELL, *op. cit. supra* note 26, at 217. For a moralistic commitment to instinctivism in relation to human sexuality, see MABEL A. ELLIOTT, CRIME IN MODERN SOCIETY 229 (1952).

[33] CALDWELL, *op. cit. supra* note 26, at 161. (Emphasis added.) Shalloo presents the social-psychological position in discussing the individualistic proposition that we must study a given boy in order to understand why he is delinquent. Shalloo says of this claim that "this is sound sense and acceptable science, if we may add that '*that* boy' includes relationships, traditions, taboos, injunctions attitudes, restrictions, ambitions and a never-ending change and definition of all these in relation to 'that boy.'" Shalloo, Book Review, 42 J. CRIM. L., C. & P.S. 655 (1952).

[34] CALDWELL, *op. cit. supra* note 26, at 164.

Lombroso did was to study the "constitution" and the "heredity" of prisoners through physical measurements and post mortems, in a search for "stigmata" and "taints"—a combination of arithmetic and surgery that retarded the progress of criminology for more than fifty years.[35] It has been observed by various students that the study of the individual criminal in the fashion popularized by Lombroso has resulted in a succession of conceptions of the criminal as being pathological, as follows:[36]

Psychiatric: neurologically pathological
Psychiatric: psychopathic
Psychological: mentally deficient
Psychological: abnormal personality
Psychonalytic: sexually repressed
Racialistic: inferior race or nationality.

None of these instinctivist, pathological concepts has endured the test of empirical and logical analysis, but Caldwell, nevertheless, associates himself with the perhaps least tenable.

It is necessary to call attention to Caldwell's methodological use of the concept "factor" in connection with the above discussion.[37] He employs it in a manner regrettably too common in the sociological literature on criminology; it would be tedious rather than difficult to cite this usage.[38] The concept "factor" is not experimentally or logically derived from previous research, except that one writer will employ the "factors" enumerated by a previous writer, who did not derive them analytically. As will be seen in the discussion of the theory of multiple causation, there is no end to the factors that can be listed. In the above usage, a factor is a purely expedient and *ad hoc* concept, in the sense that it is anything that the investigator wants to study or to refer to at a given time.

It is frequently claimed that the sociological approach to criminology must be supplemented by anthropology, biology, geography, psychology, and psychiatry. Even though illustrations from these other fields may be supplied, there is no specification as to what theoretical supplementation will be provided by the other disciplines. No conceptual scheme is provided by which the different disciplines could be organically unified into a single discipline or into a single theory (*not* a single factor). Caldwell and Tappan provide two examples. Caldwell discusses "personal" factors in crime, under the following headings:[39]

[35] Lindesmith & Levin, *The Lombrosian Myth in Criminology*, 42 AM. J. SOCIOLOGY 653 (1937).

[36] Hartung, *Methodological Assumption in a Social Psychological Theory of Criminality*, 45 J. CRIM. L., C. & P.S. 652 (1955), summarizes these pathological conceptions.

[37] CALDWELL, *op. cit. supra* note 26, c. 11.

[38] See LOWELL J. CARR, DELINQUENCY CONTROL (2d ed. 1950); RUTH SHONLE CAVAN, CRIMINOLOGY (2d ed. 1955); MABEL A. ELLIOTT & FRANCES MERRILL, SOCIAL DISORGANIZATION (3d ed. 1952); MABEL A. ELLIOTT, CRIME IN AMERICAN SOCIETY (1952); HANS VON HENTIG, CRIME: ITS CAUSES AND CONDITIONS (1947); BERNARD LANDER, TOWARDS AN UNDERSTANDING OF JUVENILE DELINQUENCY (1954); RECKLESS, *op. cit. supra* note 8; MARTIN H. NEUMEYER, JUVENILE DELINQUENCY IN MODERN SOCIETY (2d ed. 1955); PAUL W. TAPPAN, JUVENILE DELINQUENCY (1949).

[39] CALDWELL, *op. cit. supra* note 26, c. 11.

1. Heredity
2. Race
3. Physical Characteristics
   a. Sex
   b. Age
   c. Anatomical and Physiological Factors
4. Personality Conflicts
5. Mental Abnormalities
   a. Mental Deficiency
   b. Mental Diseases
   c. The Psychoses
   d. The Psychoneuroses
   e. Psychopathic Personality
   f. Incidence of Mental Disease in Criminals

One must ask the logical question: In what sense are these twelve "personal factors" actually *personal* rather than biological, genetic (hereditary), neurological, physiological, social-psychological, or statistical? In common with other such schemes, the personal, on second sight, seems to become something quite different. Mental deficiency, for example, may be organic. No neurological defect, however, has been found in the great majority of persons classified as mentally deficient! We will indicate briefly below that social-psychological concepts may also account for them. It is generally recognized that mental "disease" may be organic, or social psychological, or both. And what can possibly be personal in the statistical concept *incidence?*

Florita stated it to be his conclusion, based on intensive and prolonged study and experience in law enforcement, that:[40]

> Crime is essentially a social phenomenon and jurists and sociologists should study it, not doctors and biologists.

The modes of treatment of criminals should be sociological rather than medical, he argued further, and sociologists and educators should provide the therapy, not physicians or psychiatrists.

Paul W. Tappan, the attorney-sociologist, in discussing Florita's study, found it necessary to reject Florita's conclusions. Tappan wrote that he:[41]

> . . . cannot agree to any proposition that biological and psychological factors are not causal [in crime].

Tappan had previously come to this position in his *Juvenile Delinquency,* in which he referred to the "significant psychological and constitutional factors in the individual that may enter into deviation."[42] His fifth and sixth chapters are devoted to the listing and discussing of psychological and biological "causes and conditions" of delinquency. His list differs only in detail from Caldwell's and, therefore, need not be discussed beyond making two points briefly. First, if Tappan is correct, a science of behavior is impossible. He argues that both the observers and the

[40] Florita, *Enquiry into the Causes of Crime,* 44 J. CRIM. L., C. & P.S. 5 (1953).

[41] Tappan, *Florita's Enquiry into the Causes of Crime, id.* at 20.

[42] PAUL W. TAPPAN, JUVENILE DELINQUENCY 79 (1949). Elliott is another who apparently believes that the "innate constitution" plays a dynamic part in specific human actions. MABEL A. ELLIOT, CRIME IN MODERN SOCIETY 107 (1952).

violators of law are "*infinitely* varied products"; the differences in personality and behavior of the law violators are "much greater than the uniformities of their antisocial behavior"; and even if they commit similar crimes, they are each "subjectively distinct" from one another because the similar behaviors have emerged from "particular configurations."[43]

Second, his position is essentially psychological. To be sure, on the first page of the book, he claims that his third chapter presents a social-psychological theory of behavior, and he does refer to Charles Horton Cooley and George Herbert Mead. This claim is repudiated, however, by his emphasis that his is an eclectic approach and that "modern empirical research" is "increasingly eclectic."[44] Tappan also seemingly conceives the individual in terms of an individualistic psychology: both the delinquent and the nondelinquent result from the influences of specific *conditioning* circumstances upon their *reacting organisms*. Further, the individual's power to inhibit the affective responses of the sympathetic nervous system is particularly important, "since here is [*sic*] manufactured the emotional responses of hate, anger, and fear."[45]

The failure to maintain the distinction between an individualistic and a social psychology is by no means confined to Tappan. Cavan has an explicit and excellent statement in her *Criminology*, of a social-psychological explanation of human behavior. She employs the terms "social patterns," "behavioral roles," "self-conception," "community," and the like.[46] She also states that no special theory is needed to explain criminal behavior, in the sense that it is unnecessary to posit criminal instincts, physical anomalies, or inborn mental quirks. This straightforwardly sociological approach, however, is compromised. Sociologists, she says, tend to overemphasize the social in experience; psychiatrists and psychologists, the individual and mental factors. "Obviously," she continues, "a correlation of the two approaches is needed."[47]

It is conceivably possible, in a given instance, to overemphasize one or another component in a situation. But Professor Cavan's is the same kind of facile statement that Caldwell makes. It conveys the impression of attempted fairness to the three disciplines, with no attempt to specify the legitimate limits of any one, so that a novice, a tyro, or even an expert could recognize the overemphasis. On page eleven, Professor Cavan refers to the sociological theory that criminal behavior develops from previous experiences. But by the bottom of page twelve, she is seemingly uncertain of her social psychology and claims only that "much, perhaps most" criminal behavior is learned.

[43] PAUL W. TAPPAN, JUVENILE DELINQUENCY 65 (1949). (Emphasis added.)

[44] *Id.* at 75.

[45] *Id.* at 65, 67. Tappan refers to electroencephalography as part of an "analytical and eclectic criminology." *Id.* at 76. Professor Michael Hakeem, of the University of Wisconsin, is preparing an appraisal of electroencephalographic studies that will soon be published. Some psychiatric studies have reported no significant difference between criminals and noncriminals, and no significant correlation between EEG and type of criminal behavior.

[46] CAVAN, *op. cit. supra* note 38, at 13.

[47] *Id.* at 12.

It may be that this uncertainty results from Professor Cavan adopting a psychology of needs and tensions. She begins with the assertion that all behavior is purposive. This is too inclusive for social psychology, which holds that only *symbolic* behavior, which utilizes some form of language, is purposive.[48] The individual has "innate drives" and "urgent natural drives" (which are not described, listed, or otherwise specified), according to her psychology. When these innate drives are not organized and needs (unspecified) are not met in a realistic manner (undescribed), the resulting frustrations may be met, it is held, by an explosion, by introversion, or by indirection.[49] She is thus led, through the use of physical terms such as "tension" and "pressure," to the analogical I-beam theory of personality. Personality is likened to an I-beam, which can withstand much pressure if the moments of stress (tension) are equally distributed. If it is off-balance, through the fulcrum being off-center, the continued accretion of pressure will result in such tension that an additional increment of pressure, however infinitesimal, will cause a break.

Professor Cavan extends the physical analogy from the individual to the community in citing favorably a highly moralistic and condescending study on "community deviation pressures" by Carr.[50] In the seventh chapter of his book, Carr discusses "deviation pressure," "deviation differential," "deviation expectancy," and "conformity pressures"; his table fourteen lists eleven "deviation pressure indexes."[51] Some of the deviation pressures are: families without telephones or automobiles; houses without basements; individuals not attending church every Sunday; individuals aged twenty-one to sixty years not belonging to industrial, professional, and "etc." organizations; and individuals reading fiction instead of nonfiction! Neither Carr nor Cavan nor Caldwell give the slightest hint of the reasoning that resulted in the conclusion that these "indexes" constitute "deviation pressures" and are "delinquency-causing." What in the world can be delinquency-causing about reading fiction—even science-fiction? Or in not paying dues to some "etc." organization? Or about not attending church every Sunday, especially since this applies to the

[48] This point is explicated by the present writer in a chapter on "Behavior, Culture, and Symbolism," in a forthcoming volume, *Anthropological Essays*, to be published in 1959.

[49] CAVAN, *op. cit. supra* note 38, at 19. The individualistic psychology based on drives and needs, which is a modified form of instinctivism, has distinguished proponents in sociology. Thus, Thomas argued, some years ago, that the two real needs of human beings that explained so much of our behavior are sex and food. W. I. THOMAS, THE CONFIGURATIONS OF PERSONALITY—THE UNCONSCIOUS: A SYMPOSIUM (1927). Young also expounds a physiological psychology. KIMBALL YOUNG, *Basic Characteristics, Motivation and Emotion*, in SOCIAL PSYCHOLOGY 11 (3d ed. 1956).

[50] CAVAN, *op. cit. supra* note 38, at 163; CARR, *op. cit. supra* note 38, at 162. CALDWELL, *op. cit. supra* note 26, at 230, also accepts this study, with its analogy, naïve methodology, and moralism. Anyone who accepts "moral conformity (or) conformity to the mores of the neighborhood" as marking the normal home and some departure from this "moral conformity" as being a "deviation pressure" and "delinquency-causative" would live happily in Elmhurst, Illinois. In one subdivision of that community, every house (home?) must follow this formula at Christmastime: On the front lawn, erect a "Christmas tree" of specified height and species, a standard distance from the house, in the center of the lawn, bearing a standard number of electric bulbs of the same wattage, with the power to be turned on at the same time each evening, with arrangments for the latter to be done if one will not be in his house.

[51] CARR, *op. cit. supra* note 38, at 162. The quotation marks indicate that the use of nouns to modify nouns is Carr's.

overwhelming proportion of the population, the majority of whom do not even belong to any church? There would be implications for preventive programs if Carr or Cavan or Caldwell would specify the delinquency-causing qualities of houses without basements. One can anticipate: dig basements and reduce delinquency.

It should be explicitly stated, nevertheless, that Professor Cavan's *Criminology* is sociological, and that social psychology predominates over psychology. It is hardly possible to make the same statement concerning Reckless' work. Reckless also uses the physical terms "pressure" and "tension" in his exposition of the I-beam theory of personality, using picturesque, analogical, and confusing language. He writes of the offender whose violation is eruptive:[52]

> Tensions have been welling up in him for a long time. He finally comes to a breaking point and "blows his top."

The fault, he says, may be in the person—"some lurking weakness or inadequacy." In four paragraphs, he uses physicalistic terms to describe personality and human behavior about thirty-eight times.[53]

The I-beam theory of personality—which is more common than the few citations here would indicate—in its concern with pressures building up, some weakness, whether or not lurking, and a breaking point, is on a lower theoretical level than the folk saying about the straw that broke the camel's back.

The explicit commitment to sociology and social psychology that is compromised often to mere lip-service through accepting some form of constitutional psychology, or through confusing individualistic with social psychology, or through the use of analogy, is common in criminology. Further discussion would be repetitious, but a few more references may be cited.[54]

The discussion thus far can be briefly summarized: The picture presented by the sociological approach to criminology is confused.

1. There is the claim that only a few people take constitutional psychology and its cognates seriously.

2. There are many who do take it seriously:

a. Some would unify constitutional psychology and its cognates with sociology.

b. Some explicitly reject it, but admit through the back door, biology, genetics, instinctivism, neurology, psychiatry, and individualistic psychology.

c. This is particularly evident in the writings of those students who place, under

[52] RECKLESS, *op. cit. supra* note 8, at 73.

[53] *Id.* at 79. Glueck does a little better on this than Reckless. In one paragraph, Glueck uses such physical terms as weight, pressure, scale (balance), energy, and force about eighteen times. Glueck, *Theory and Fact in Criminology*, 7 BRIT. J. DELINQ. 92, 105 (1956).

[54] Barnes, *Criminology*, 4 ENCYC. SOC. SCI. 585 (1932); HARRY E. BARNES & NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY c. 6 (2d ed. 1951); MILTON L. BARRON, *The Biology and Psychology of Juvenile Delinquents*, in THE JUVENILE IN DELINQUENT SOCIETY 106 (1954); Beeley, *A Socio-Psychological Theory of Crime and Delinquency: A Contribution to Etiology*, 45 J. CRIM. L., C. & P.S. 391 (1954); JOHN L. GILLIN, THE WISCONSIN PRISONER (1946); HANS VON HENTIG, THE CRIMINAL AND HIS VICTIM (1948); NEUMEYER, *op. cit. supra* note 38; DONALD R. TAFT, CRIMINOLOGY (3d ed. 1956); NEGLEY K. TEETERS & JOHN OTTO REINEMANN, THE CHALLENGE OF DELINQUENCY (1950); GEORGE B. VOLD, in THEORETICAL CRIMINOLOGY 183 (1958).

the category "personal," phenomena that logically are part of the disciplines listed under b. *supra*. Some even include statistics, which is certainly impersonal.

3. Confusion and misconception is perpetuated:

a. There is an expedient and *ad hoc* use of the concept "factor" in causal theories.

b. Some destroy the possibility of a behavioral science by claiming infinite variety between all human beings and greater differences than similarities between offenders.

c. There is an attempt to explain behavioral, psychical, and social phenomena by the use of physical terms and analogies.

4. There are some who are consistently and more or less systematically sociological and who try to be constructive through attempting to develop an integrative and unifying theory.

IV

Criminologists, among others, have been concerned with the problem of intelligence in relation to crime. Perhaps the reputation of sociologists for destroying rather than building is based largely on the fact that they have succeeded in practically evicting from criminology the serious consideration of low intelligence as the cause of crime, or even as a major or minor cause. Since various textbooks in the field present an adequate history of this, it is unnecessary to repeat it here. It should be stated, however, that in their attacks on the neurological and psychological hypothesis that the criminal is, on the whole, feeble-minded or of low intelligence, the sociologists were particularly constructive.

It seems that most, if not all, criminologists in this country accept the sociological conclusion that the criminal is a normal human being, at least as far as intelligence is concerned. Practically every textbook will have a statement comparable to that of Cavan or Clinard: statistical studies establish the fact that criminals are drawn from all levels of intelligence, in much the same proportion that these levels are found in the general population.[55]

Sociologists, in discussing intelligence in relation to crime, have generally proceeded from the social-psychological position of symbolic interaction, exemplified in the work of Charles Horton Cooley.[56] In the first edition of his work, Cooley had shown that intellectual development is wholly a sociocultural process. He extended empirically the logical analysis of the philosophy of science developed by Peirce.[57] In his second edition, Cooley showed that the results of intelligence tests could be explained more reasonably in terms of language, family life, education, and occupa-

[55] CAVAN, *op. cit. supra* note 38, at 53; MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR 119 (1957). GEORGE B. VOLD, THEORETICAL CRIMINOLOGY (1958) has an excellent chapter on the history of mental testing and theories of feeble-mindedness in this field. It reveals very clearly the constructive character of the sociological approach to this problem.

[56] CHARLES H. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER (1902, 2d ed. 1922).

[57] CHARLES S. PEIRCE, *Concerning Certain Faculties Claimed for Man*, and *Some Consequences of Four Incapacities*, in 5 COLLECTED PAPERS 135, 156 (1934).

tion than by alleged hereditary differences between groups and individuals in the capacity to learn. The next year, Kroeber, in anthropology, was advancing the same argument.[58] Having thus empirically demonstrated that there is a social psychology of intelligence and having logically and empirically established their claim to investigate it, sociologists abandoned it to psychologists. It has languished with the latter until recently; some backsliding sociologists even assert openly that intelligence is no business of theirs.

Thus, the censure to be laid upon sociology is that it has refused to investigate a type of behavioral and sociocultural phenomenon whose existence it established against the strenuous resistance of psychology and several other disciplines—namely, the social psychology of intelligence. Three recent and excellent discussions of intelligence in relation to crime and delinquency are presented in Clinard,[59] Sutherland and Cressey,[60] and Vold.[61] None, however, goes beyond the historical recitation and presentation of the conception of the delinquent and criminal as being just as normal in this respect as the population as a whole.

An admittedly incomplete search of the sociological literature of the past decade or so uncovered only one attempt on the part of a sociologist to assert the right of sociology to deal with the general problem of intelligence, independent of delinquency. The following discussion draws heavily on the study by Edward J. Ferentz.[62]

Many hospitals and state institutions make free use of the "familial" or "garden-variety" type of mental deficiency. This is a class for which no neurological pathology of the brain or central nervous system has been found, but for which an hereditary mental defect is asserted or assumed.[63] Sarason estimates that from forty-five to fifty-five per cent of institutionalized defectives and from sixty-five to seventy-five per cent of noninstitutionalized defectives are of this garden-variety type.[64] He shows that the data necessary for meeting the criteria of mental deficiency are in practice usually not available. It "seems clear," he says, that the evaluation of the intelligence of parents and siblings is largely made on the basis of reports from secondary and tertiary sources. To confirm this last point, Sarason studied all twenty cases of children admitted to an institution during a six-month period who had been diagnosed as garden-variety defective. The twenty children were subjected to a pre-commitment test, usually the Stanford-Binet. Of the twenty mothers, only five had

[58] A. L. KROEBER, ANTHROPOLOGY c. 4 (1923).

[59] MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR 116 (1957).

[60] EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 117 (5th ed. 1955).

[61] GEORGE B. VOLD, THEORETICAL CRIMINOLOGY 75 (1958).

[62] Ferentz, *Mental Deficiency Related to Crime*, 45 J. CRIM. L., C. & P.S. 299 (1954). The following publications were consulted for the period since at least 1940: all of the textbooks in criminology, several of the books dealing with sociological theory, the *American Journal of Sociology, American Sociological Review, British Journal of Sociology, Federal Probation, Journal of Criminal Law, Criminology and Police Science*, and *Social Forces*.

[63] Yannet, *Mental Deficiency*, in A. G. MITCHELL & W. E. NELSON (EDS.), TEXTBOOK OF PEDIATRICS 1274 (5th ed. 1950).

[64] SEYMORE B. SARASON, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY 102 (2d ed. 1953).

been tested, and the data on one was not available; none of the twenty fathers had been tested; only twenty-five of seventy-six siblings had been tested, and they came from only eight of the twenty families.[65]

Tappan presents a case of a garden-variety mental defective who was delinquent to illustrate "hereditary influences" as one of the "biological causes" of delinquency.[66] The girl had an I.Q. of 70, neither she nor other members of the family were given neurological examinations, but she was still committed to an institution for the feeble-minded. The mere assertion of hereditary influence, illustrated in this case, is insufficient, particularly when it contradicts the social-psychological analysis of personality. That analysis views the development of personality in terms of the learning of sets of roles, the expectations associated with those roles, and the situations in which the roles are to be innervated. Such an analysis makes possible a conceptual continuity between personality and the garden-variety of mental deficiency. If one's organization of roles is learned through symbolic communication with others, then the garden-variety of mental defective can be shown to be socialized into his role as a mental defective! His socialization would not be due to any inherent mental defect, because without sufficient capacity, the entire complex process could not take place.[67]

Neither the theoretical nor the practical problems posed by the concept of mental deficiency or feeble-mindedness have been explored in any systematic fashion. Practically all psychologists and psychiatrists, as well as sociologists and social psychologists, have simply accepted the concept.[68] In theory and in practice, the statement that a given person is mentally deficient has generally been stated as a neurological proposition. In most cases, however, the test of the proposition has been behavioral, not neurological. One of the things for which human behavior is notorious is that it is greatly influenced by experience. The most universal fault of biological theories of human behavior, including criminality, is that the theories are tested in terms of behavioral data, rather than biological data. It seems that this is the most devastating criticism that one can make, whether the theory is that of Glueck, Hooton, Sheldon, Tappan, or Caldwell.[69]

[65] *Id.* table 4, at 102.

[66] PAUL W. TAPPAN, JUVENILE DELINQUENCY 123 (1949).

[67] SARASON, *op. cit. supra* note 64, cc. 4-6, presents a good deal of evidence in support of this conclusion.

[68] The present writer is engaged in investigating some of the social-psychological problems related to the concept: the constancy of the intelligence quotient, the relationship between content of sociocultural experience and IQ, the methodology of test construction, and the relationship between selected aspects of parental background and child's IQ. See Sarason & Gladwin, *Psychological and Cultural Problems in Mental Subnormality: A Review of Research*, 57 GENETIC PSYCHOLOGY MONOGRAPHS 3 (1957); GERHART SAENGER, THE ADJUSTMENT OF SEVERELY RETARDED ADULTS IN THE COMMUNITY (1957).

[69] The discussion has contended for the logical inclusion within sociology of the garden-variety of mental "defective," thus extending the legitimate limits of sociology and criminology, as over against the implied claim of neurology and of (clinical) psychology for exclusive jurisdiction. For a discussion of psychiatric claims, see Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, *supra* 650, as well as his two other excellent studies: *A Critique of the Psychiatric Approach to the Prevention of Juvenile Delinquency*, 5 SOCIAL PROBLEMS 194 (1958), and *A Critique of the Psychiatric Approach*, in JOSEPH ROUCEK (ED.), JUVENILE DELINQUENCY 79 (1958).

V

It can be said, figuratively speaking, that sociology in general and criminology in particular has been, is, and will continue for some time to be schizophrenic on the problem and concept of social organization. One of the basic themes of the sociological analysis of human society is that of two fundamentally different types of social organization. These types, not mutually exclusive as societies exist in fact, are based on the principle of the homogeneity of groups within a society.

In the homogenous type, a common system of values possesses the members, so that they tend to act similarly in similar situations. This condition is referred to as "consensus." Many sociologists contend that consensus is synonymous with social organization. When consensus disappears, in the sense that competing systems of values exist in the same society, these sociologists hold that social disorganization has developed. We are said to have become a mass society.

In the heterogeneous type, a common system of values still maintains its hold upon the members. Free-standing groups have developed, however, that are, to some extent, emancipated from the common values in respect to conditions with which they are especially concerned. These groups develop a system of values specific to themselves and eccentric to the common system. This results in a societal condition in which all persons tend to act similarly in certain types of situations and differently in certain other similar types of situations. This is a condition referred to as "the organization of differences,"[70] and more recently as "differential social organization."[71] The following discussion will be concerned with the concept of social disorganization. Without attempting any historical summary, it can be said that the current usage of this concept results largely from its explication, but not necessarily elucidation, by Thomas and Znaniecki, who defined social disorganization as:[72]

> . . . a decrease of the influence of existing social rules of behavior upon individual members of the group.

This conception and definition has been adopted in practically all of the textbooks dealing with social problems and all of the textbooks bearing "social disorganization" in their title that have been published since 1918.[73] A number of sociologists have, unfortunately, adopted the concept as a major, if not *the*, explanation of crime. In so doing, they have also adopted all of the logical and empirical problems that accompany the concept. A few years ago, Mills, in a study of these textbooks, found in them a pronounced tendency for "society" to be conceived in terms of primary groups and small homogeneous communities. He also found their level of theoretical abstraction so low that they were hardly more than bodies of meagerly-connected facts, and marked by a paste-pot eclectic psychology to provide a rationale for their

[70] CHARLES H. COOLEY, SOCIAL ORGANIZATION 61 (1917).

[71] EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 157 (5th ed. 1955).

[72] 2 W. I. THOMAS & FLORIAN ZNANIECKI, THE POLISH PEASANT IN EUROPE AND AMERICA 1128 (1918), reprinted in part in EDMUND H. VOLKHART (ED.), SOCIAL BEHAVIOR AND PERSONALITY 233 (1951). See also W. I. THOMAS, THE UNADJUSTED GIRL c. 3 (1923).

[73] A refreshing change is MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR (1957).

facile analysis.[74] Mills's study, objective as it is, and acidic in its very objectivity, is a damning indictment that could hardly be improved today, since so much of what he said still applies. In reading even the books published since 1950, one receives the impression that the authors are small-town natives pointing with alarm to the big city as being the sink of iniquity. Thus, Elliott claims that "displaced" country people in this country, unaccustomed to the complexities and stimulations of city life, "are easy prey to the temptations of crime."[75]

Since Mills's analysis is still largely correct, it will be sufficient here merely to indicate two points concerning contemporary social disorganizationists. First, they are quite adept at self-contradiction. Second, the approach to whatever they write about in general and to crime in particular, is negativistic. Several examples will illustrate the first point.

Elliott says that unpunished criminals and recidivistic prisoners are the real criminals because:[76]

> . . . they have organized their lives *without reference to social values.* They have justified their lifework . . . *on a basis of the material rewards.* . . .

Whatever hope there is for reforming the criminal, Professor Elliott continues, "must lie in some *conversion of his values.*" The significance of the quotations is not that her moralism is showing, but rather that she has contradicted herself within two sentences. An amazing self-contradiction within a single sentence is her statement that "Organized crime is one of the amazing aspects of social disorganization . . ."![77]

Cavan also seems to contradict herself by referring to the simultaneous absence and presence of social controls:[78]

> Community controls are weak, both because conventional institutions are weak or non-existent and because pernicious institutions flourish in floundering, leaderless communities.

Lander states that:[79]

> [Certain areas of the city] are characterized by a general social instability and weakening of the social controls and norms which reflect themselves in a high delinquency rate for all groups. . . .
>
> . . . . One would expect a high delinquency rate in an area characterized by normlessness and social instability.

On the next page, however, Lander states that it would be "erroneous" to conceive of areas with high rates of delinquency as being "devoid of norms and group controls," since gangs are "highly regulatory" of the behavior of their members.

[74] Mills, *The Professional Ideology of Social Pathologists,* 49 AM. J. SOCIOLOGY 165 (1944).

[75] MABEL A. ELLIOTT, CRIME IN MODERN SOCIETY 94 (1952).

[76] *Id* at 82. (Emphasis added.)

[77] *Id.* at 135. Another self-contradiction can be found on p. 13; other instances of moralism can be found on pp. 134 and 136.

[78] CAVAN, *op. cit. supra* note 38, at 94.

[79] BERNARD LANDER, TOWARDS AN UNDERSTANDING OF JUVENILE DELINQUENCY 65, 89 (1954).

Caldwell writes that if social disorganization, defined as the decreasing influence of social control, persists, then:[80]

> . . . crime and delinquency tend to become institutionalized in certain . . . neighborhoods . . . *subcultures* favorable to law violation develop and the principal roots of *professional* and *organized* crime flourish.

A second characteristic of the social disorganizationists is that their analysis of society and of crime in particular is negativistic. Crime is conceived—and so are the various other social problems—as resulting from the breakdown, the disintegration, or the failure (all three terms are used) of society as a whole, or of specific institutions. Society is "sick" or "delinquent," and the individual, particularly the juvenile, is its victim. This is an old man's conception—namely, the notion that today's morals have degenerated, while yesterday's were advanced and refined. It is the biblical mythology of the Fall, popularized in sociology by the "Chicago school." The *reductio ad absurdum* of this position is the rather frequent assertion that individuals abandon social dictates and follow the lead of individual impulses into irregular or criminal behavior.

With the exception of writers of textbooks, the trend of current publication and research is away from social disorganization. Recently, good textbooks have been written that do not depend on the concept.[81] One can cite two reasons for this trend: First, common sense was too much for the absurdities of social disorganization. Students often ask, "If we are actually so disorganized, how were we able to win two world wars and recover from the worst depression in our history, and why doesn't this country collapse over night?"[82] Second, much, if not most, of the recent criminological (etiological) research and also of correctional research has found social disorganization and its related concepts unworkable, unnecessary, and incorrect. This research does not find that individuals are progressively freed from social restraint, being thus (relatively) free to act on the basis of chance, or at random or fancy. It does find that in a heterogeneous society, the constraining influence of one value-system is substituted for another and that individuals characteristically are possessed by more than one value-system. One of its important conclusions is that social control is not diminished in a heterogeneous society. This research is, in part, based on the conception of social organization as consisting of the organization of differences.[83] Some of its concepts are: role, reference group, subculture, self, motivation, differential association, differential identification, and differential social organization.

[80] CALDWELL, *op. cit. supra* note 26, at 178. Other self-contradictions will be found on pp. 143 and 223, and between pp. 144 and 151. Caldwell is the worst offender in this respect, because he scolds Sutherland for using the term "social disorganization," although he himself uses it more than 100 times, often as an explanatory device and without strict definition. *Cf. id.* at 183.

[81] *E.g.*, MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR (1957).

[82] See CALDWELL, *op. cit. supra* note 26, at 144.

[83] Exemplified in CHARLES H. COOLEY, SOCIAL ORGANIZATION pt. 2 (1917).

VI

Current sociological research on crime and delinquency rejects the motto, *facilis descensus Averno,* as being sociologically incorrect. In contrast, it holds that crime and delinquency are most usefully and correctly conceived as positive phenomena of the sociocultural process. Delinquency is conceived as a definite achievement, often the result of years of prolonged effort and hard work. It also holds that the same sociocultural processes that produce the criminal person produce the lawful person. This indicates why the sociological and social-psychological view is superior to others: it brings the widest range of behavioral, cultural, and social phenomena within the scope of a single theory. It is, therefore, unnecessary to invent specific pathologies to explain specific problems.

Much of the current research is concerned with developing a systematic and unifying theory and with establishing, therefore, the logical limits of criminology—which would also, of course, help to establish the logical limits of sociology, since the two have grown together, at least in this country. Two examples will suffice: white-collar crime and sexual offenses.

Sutherland published his book, *White Collar Crime,* in 1949, incorporating several previously published papers. The book, he said, was a study in the theory of criminal behavior: "It is an attempt to reform the theory of criminal behavior, not to reform anything else."[84] The negative theoretical thesis of the book is that biological, personal, and social pathologies are an inadequate explanation of criminality, because they are wholly unable to explain the data of white-collar crime. Its positive thesis is that the theory of differential association perhaps fits the data of criminality, including white-collar crime, better than any other general hypothesis.[85] Other investigators published empirical research on white-collar crime, the amount of which is too great to cite completely.[86] Many criminologists accepted the concept of white-collar crime, recognizing its great theoretical significance. First, it freed criminology from its empirical dependence on *Uniform Crime Reports.* Second, it offered another means to test the various pathological theories of crime. Third, it extended the logical limits of criminology by laying claim to that vast body of crime that is no concern of municipal, county, and state police departments and which is, therefore, "unknown" as far as those departments and the Federal Bureau of Investigation are concerned.

Some criminologists, however, rejected the concept "white-collar crime" in whole or in part. Their objections, in general, were either to the concept itself, or to the

[84] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME v (1949).

[85] *Id.* at 6, 234.

[86] MARSHALL B. CLINARD, THE BLACK MARKET (1952); FRANK E. HARTUNG, LAW AND SOCIAL DIFFERENTIATION (1949); *White-Collar Offenses in the Wholesale Meat Industry in Detroit,* 56 AM. J. SOCIOLOGY 25 (1950), *White Collar Crime: Its Significance for Theory and Practice,* Fed. Prob., June 1953, p. 31; and *Common and Discrete Values,* 38 J. SOC. PSYCHOLOGY 3 (1953); Lane, *Why Business Men Violate the Law,* 44 J. CRIM. L., C. & P.S. 151 (1953); Newman, *Public Attitudes Toward a Form of White Collar Crime,* 4 SOCIAL PROBLEMS 228 (1957).

inclusive theory of differential association, or both. The objections to the concept itself will be considered first.

Burgess objected that the concept, as defined in research, was too legalistic; Tappan, that it was too sociological.[87] Caldwell, a strident critic of the concept who does not understand it very well, had several objections. First, there are minor variations in its definition from one researcher to another. Caldwell suggests that until unanimity can be achieved, the concept should be discarded altogether. One might just as well suggest that until the critics can agree as to what is wrong with the concept, they should remain silent. It would be employing Caldwell's logic to suggest that legislatures cease enacting laws until the forty-eight states are unanimous in their definitions of crimes. Second, Caldwell alleges that Sutherland, Clinard, and Hartung disregarded the important element of conviction. This is not true, as will be shown below. Third, he wants to protect the right of the businessman not to be called a criminal unless and until he has been convicted in a criminal court,[88] which is what Tappan wants, and also Vold, who objects to the "paradox" in the proposition that "a community's leaders and more responsible elements are also its criminals."[89] If Vold had written that *some* leaders and more responsible citizens are also *among* its criminals he would have reported accurately the sense of the literature. No proponent of the concept has claimed, at least in print, that a community's leaders are *its* criminals.

The above three hearts who bleed so profusely for the maligned businessman and for Anglo-American jurisprudence leave one untouched. First, they in effect argue that no crime has been committed and that no person is a criminal until there is a conviction for that crime. This is an absurdity. They confuse the commission of a crime with the conviction for its perpetration when they discuss white-collar crime. But when they discuss the limitations of criminal statistics, they all agree—as does everyone else—that many persons who commit crimes are not even apprehended, let alone convicted. Second, they all accept *Uniform Crime Reports*, even though it deals largely with *arrests*. Much, of course, stands between arrest and conviction. They are, thus, not as solicitous of the lower class being branded "criminal" as they are of the upper class. Third, of all the critics of white-collar crime, only Tappan enters court with one clean hand.

Among the critics, only Tappan has protested against the broadening of the concept of delinquency to include the nondelinquent. He writes that the trend[90]

> . . . to expose so-called predelinquents to the unofficial treatment of courts, police bureaus, and other authoritarian and nonspecialized agencies is a dangerous consequence of loose definitions and of indiscriminate prophecy from inadequate data.

Tappan's stricture, of course, applies to such inventions as the Gluecks' "causal law"

[87] See Burgess, *Comment*, 56 AM. J. SOCIOLOGY 32 (1950); Tappan, *Who Is the Criminal?*, 12 AM. SOCIOLOGICAL REV. 96 (1947).

[88] CALDWELL, *op. cit. supra* note 26, at 67.

[89] GEORGE B. VOLD, THEORETICAL CRIMINOLOGY 253 (1958).

[90] Tappan, *Sociological Motivations of Delinquency*, 108 AM. J. PYCHIATRY 680 (1952).

and "prediction tables" and Kvaraceus' "delinquency proneness scale."[91] Lewis Diana, in a brilliant analysis, has shown that in many jurisdictions, there has been a removal of virtually all the procedural safeguards of the penal code in the juvenile court and the formulation of a conception of that court which makes it a child-guidance agency supported by the compelling power of the state.[92] Neither Caldwell nor Vold have made a comparable protest.

It seems that none of the critics has undertaken empirical research in the area of white-collar crime. That research reveals several matters of theoretical importance. First, well-established businessmen *have* been convicted. One study shows the following convictions among a total of 122 cases: three prison terms only, twenty-two fines only, twelve combined prison term and fine, six suspended prison terms, and eight probation only.[93] The New York Times of April 10, 1958 reports that the owner of a tenement in Niagara Falls was sentenced to two to five years in prison. Fifteen children and three adults had burned to death; regulations concerning fireproofing, partitions, and exits had not been observed. Second, there are, as yet, no criteria by which seriousness of an offense can be judged, if the proceeding is civil rather than criminal. Many laws regulating business provide for both types of proceedings, but the criminal proceeding is permissive, not mandatory. A reading of the cases in the files of the Detroit office of the Office of Price Administration revealed that, in a number of civil proceedings, the violations were "wilful and calculated," which is to say they were criminal. Nonjuridical considerations led to the choice of the civil rather than the criminal remedy. When the federal antitrust law was enacted, providing for both civil and criminal process for the *same* violation and making the criminal proceeding merely permissive, was not "copping a plea" legalized for the businessman? Newman has undertaken some excellent research on "pleading guilty for considerations."[94] Third, there are striking parallels, as Sutherland showed in *White Collar Crime,* and as confirmed by Clinard and Hartung, between "ordinary" crime and white-collar crime.

It seems that the concept is here to stay and that empirical research related to it is logically forcing a reappraisal of all extant theories of crime. And the concept has, very importantly, extended the logical limits of criminology by bringing within its purview all who have violated criminal laws, not only the adults apprehended by the police, and juveniles.

Some objection was voiced to white-collar crime because Sutherland explicitly related it to his theory of differential association. That theory, formulated in 1939 in the third edition of his *Principles of Criminology,* has been under continuous discussion since its publication. It is the most sociological of all the theories that have

[91] WILLIAM C. KVARACEUS, THE COMMUNITY AND THE DELINQUENT c. 5 (1954).

[92] Diana, *The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures,* 47 J. CRIM. L., C. & P.S. 561 (1957).

[93] FRANK E. HARTUNG, LAW AND SOCIAL DIFFERENTIATION 252 (1949).

[94] Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice,* 46 J. CRIM. L., C. & P.S. 780 (1956); DONALD J. NEWMAN, A STUDY OF INFORMAL PROCESSES IN FELONY CONVICTIONS (unpublished thesis in University of Wisconsin Library 1954).

been developed in the attempt to account for crime and delinquency. It is, indeed, more—by extrapolation, it is a sociological attempt to account for human social behavior in terms of social organization and culture, employing a social-psychological orientation. The theory has been neglected by some, rejected by some, and accepted by some. Psychiatrists have, in general, neglected it. Criticisms have ranged from the vitriolic[95] to the incomprehensible,[96] and from the carping to the unfair. Perhaps the best example of unfair criticism is by Caldwell, who insisted on discussing and dissecting Sutherland's 1939 version, even while he had the 1947 and 1955 versions in front of him.[97] Caldwell takes Sutherland to task for modifying his theory through the years! Sutherland modified it because its scope was to be expanded on both empirical and theoretical grounds. Caldwell also seems to be irritated because Sutherland and Cressey account for "negative cases" (good or nondelinquent boys) in terms of social organization, without resorting to the mysticism of "personal factors," "free will," and the like, as Caldwell does.[98]

Most of the theoretical controversy and development, as well as empirical research, of the past several decades can be discussed in relation to the theory of differential association. Some of the items are: the character of a sound criminological theory, delinquent subculture, the relation of social class to delinquency, social structure and roles, nondelinquent and delinquent boys, concealed (unreported or undetected) delinquency, self and identification.

Perhaps the first result of the formulation of the theory was to call into question the theories of multiple causation. Explicitly started by Healy, accepted by Burt, and slavishly followed by the social disorganizationists, multiple causation has remained a popular and facile conception.[99] Sutherland himself started with this popular notion, saying, ". . . I had a congeries of discrete and coordinate factors, unrelated to each other, which may be called the multiple-factor theory."[100] Datta says that one cannot take the best of many disciplines, mix them, and emerge with "theory, eclectic." The eclectic view is not theory, she says, but hodge-podge.[101]

Cohen, in one of the best critiques of the multiple-causation approach, makes three points.[102] First, there has been a failure to distinguish explanation by a single *factor* from explanation by a single *theory*. A theory deals with a number of

[95] Glueck, *Theory and Fact in Criminology*, 7 BRIT. J. DELINQ. 92 (1956), says that the theory is, "at best," general and puerile.

[96] Gill, *An Operational View of Criminology*, 1 ARCH. CRIM. PSYCHODYN. 3 (1957).

[97] CALDWELL, *op. cit. supra* note 26, at 181.

[98] *Id.* at 225. Caldwell has a fairly good restatement of differential association, but does not refer to it by name. *Id.* at 251.

[99] WILLIAM HEALY, THE INDIVIDUAL DELINQUENT (1913); CYRIL BURT, THE YOUNG DELINQUENT 574-83 (1925).

[100] COHEN, LINDESMITH, & SCHUESSLER, *op. cit. supra* note 15 at 14. This account by Sutherland of the development of his theory is a record of intellectual honesty and modesty, rarely encountered in one who has achieved pre-eminence in his field. This book very likely will give impetus to further empirical and theoretical research.

[101] DATTA, *op. cit. supra* note 5, at 15.

[102] ALBERT K. COHEN, JUVENILE DELINQUENCY AND THE SOCIAL STRUCTURE (unpublished thesis in the Harvard University Library 1951).

variables, which it organizes and relates to each other. But neither a statement of one factor nor of a number of factors about crime is a theoretical explanation of crime. Second, "factors" tend to become "causes," and each factor is assumed to contain within itself a fixed amount of delinquency-producing power.[103] Third, the fallacy that "evil causes evil" is employed. The fallacy is that "evil" results (delinquency) must always have "evil" precedents (broken home, psychopathy, and the like). Recent research has no need for multiple causation, but, like astrology, it is likely to be with us for some time.

The work of Shaw and McKay in establishing the existence of a delinquent and criminal subculture is so well known in the field that it need not be repeated here. Much of the research has confirmed their findings, but has refined the techniques employed in the research and modified and expanded the theoretical discussion, leading toward a generalizing and integrative theory. A good deal of the research on crime and delinquency in England during the past decade or so falls in this category. Morris, for example, in his study of delinquency in Croydon, shows that in the theory of differential association, mobility and interstitial or deteriorated areas are not crucial or directly causal.[104] What is crucial is the content of the tradition of the area, the first-hand relationship of younger boys with older delinquent boys, of the latter with young adult criminals, and of the latter with older adult criminals; and impersonally, the persisting subcultural system of crime and delinquency. Morris, however, very often employs the term "ecological" where usage in this country would dictate "social-psychological" or "sociocultural." One of the great values of Morris' book is his lengthy historical chapter on research during the nineteenth century, which helps to establish the legitimate claim of sociology to the field of criminology.

Lind found that in Honolulu, the spatial distribution of delinquents' homes, cases of dependency, arrests in connection with commercialized vice, and suicides, tended to follow the same spatial pattern as in cities in this country.[105] Lind also found, as an aspect of social organization, that while the conservative influence of the immigrant community tended to shield the individual from cultural conflict, it often tended to bring him into conflict with the law.

Shannon undertook an ingenious and painstaking study of the distribution of criminal offenses by states, for the years 1946 through 1952.[106] His research supports the hypothesis that crime is largely a function of social and cultural influences. Since great differences in criminal rates on a regional basis persist over a period of time, one may hypothesize that subcultural variations of a regional character are responsible

[103] For an example of the ease with which "factors" become "causes," see Elliott, *Perspective on the American Crime Problem*, 5 SOCIAL PROBLEMS 184 (1958).

[104] TERENCE MORRIS, THE CRIMINAL AREA (1958).

[105] Lind, *Some Ecological Patterns of Community Disorganization in Honolulu*, 36 AM. J. SOCIOLOGY 206 (1930).

[106] Shannon, *The Spatial Distribution of Criminal Offenses by States*, 45 J. CRIM. L., C. & P.S. 264 (1954).

for these regional patterns of crime. The demonstration of the constancy of social phenomena is basic to the sociological view.

Clinard's research on rural offenders tends to support the theory of the functioning of a criminal culture.[107] Conceiving urbanization as a way of life marked by size, density of population, heterogeneity, and impersonality in interpersonal relations, he studied offenders from villages, small towns, and cities in Iowa. Differential association tended to vary directly with the degree of urbanization in the locality from which the boys came. Rural "gangs," when they were found, were only loosely organized. Clinard concluded that the closely-organized gangs of the city can exist only to the degree to which social relations tend to be impersonal. This is, however, still open to question, because rural crime has not been extensively studied with reference to its frequency and degree of organization. Esselstyn's study of the county sheriff is a case in point.[108] He found that the ideal sheriff, as a social type, was a mature man with a good reputation and a knowledge of farming. Experience in law enforcement was unnecessary; interpretations of the law were very broad, being controlled by local custom. The sheriff had a high tolerance for certian types of lawlessness: the conduct of agriculture was outside the law. This confirms Sutherland's view on white-collar crime—namely, that some of the favored groups' business practices, while illegal, do not result in legal action. England is of the opinion that in towns in which the police force ranges in size from one to about seven men, the "city-fathers" largely determine what laws and ordinances will be enforced, and against whom.[109]

There are many other significant empirical studies which confirm the sociological conclusion that crime and delinquency are positive achievements of individuals participating in a social organization marked by a criminal subculture and tradition that is crucial in the maintenance of crime and delinquency. The following references are by no means a complete inventory.[110] Among the most important of the

[107] Clinard, *The Process of Urbanization and Criminal Behavior*, 48 AM. J. SOCIOLOGY 202 (1942).

[108] Esselstyn, *The Social Role of a County Sheriff*, 44 J. CRIM. L., C. & P.S. 177 (1953).

[109] Ralph W. England, Jr., in a personal communication. Eastman undertook a replication of Clinard's study, which at least in part confirmed Clinard's results. HAROLD D. EASTMAN, THE PROCESS OF URBANIZATION AND CRIMINAL BEHAVIOR: A RESTUDY (unpublished thesis in University of Iowa Library 1954). Clinard's replication of his own study in Sweden, in 1954-55, will soon be published. Clinard's position was also partially confirmed by Lentz, *Rural-Urban Differentials and Juvenile Delinquency*, 47 J. CRIM. L., C. & P.S. 331 (1956).

Some other aspects of rural crime that could be studied are: the Ku Klux Klan, "mortgage holidays" to prevent the auctioning of farms, violations of game laws, illegal slaughtering of calves and cattle, violations of laws and regulations controlling acreage, the cheating of sharecroppers, and failure to pay state sales taxes on farm produce sold.

[110] Baker, *Juvenile Delinquency and Housing in a Small City*, 44 J. CRIM. L., C. & P.S. 442 (1954); *Parental Organizational Affiliation and Juvenile Delinquency*, *id.* at 204; Deutscher, *The Petty Offender: A Sociological Alien*, *id.* at 595; Lane, *supra* note 86; Kobrin, *The Conflict of Values in Delinquency Areas*, 16 AM. SOCIOLOGICAL REV. 653 (1951); Clinard, *Criminal Behavior Is Human Behavior*, Fed. Prob., March 1949, p. 21; PAUL L. CRAWFORD, DANIEL I. MALAMUD, & JAMES R. DUMPSON, WORKING WITH TEEN-AGE GANGS: A REPORT ON THE CENTRAL HARLEM STREETS PROJECT (1950); Hakeem, *Service in the Armed Forces and Criminality*, 37 J. CRIM. L. & CRIMINOLOGY 120 (1947); M. A. Straus & J. H. Straus, *Suicide, Homicide, and Social Structure in Ceylon*, 58 AM. J. SOCIOLOGY 461 (1953);

recent researches is the work of Cohen on delinquent boys.[111] The subtitle of the book refers to its major task: to account for the delinquent culture of the gang in sociological and social-psychological terms. The problem is discussed in relation to class structure, cultural change, and role-playing. Cohen conceives the development of a delinquent subculture as a process that builds, maintains, and reinforces a code of behavior that stands, in some respects, in a point-to-point inversion of the dominant (middle-class) values. The delinquent subculture is held to be developed and maintained as a solution to the problems confronted by the lower-class youth that relate to status. Middle-class male delinquency, Cohen tentatively hypothesizes, is quite different. It is a consequence of the middle-class adolescent boy's anxiety concerning his masculine role. Cohen's book shows that good criminology is good sociology: the same social processes and the same set of concepts and logical assumptions account for both delinquency and lawfulness.

Two appraisals of Cohen's work have appeared, which have significance for the general sociological proposition of the existence of a criminal culture and its crucial role in the crime and delinquency of the individual. Wilensky and Lebeaux have some very thoughtful comments to make on Cohen's work.[112] They accept his general position and recognize, for example, that there may be a number of somewhat distinct subcultures. Their principal criticism is of Cohen's interpretation of middle-class male delinquency as being a response to the boy's problem of masculine identification. They hold that the problem of identification with his sexual role presents a relatively more pressing problem to the lower-class boy. He is subject to ridicule much earlier and in a different manner than the middle-class boy if he cannot sexually "prove" himself a man. Thus, the lower-class boy has two sources of anxiety: one relating to occupational and financial security, the other relating to his sexual role as a man. They predict, on this basis, that the working-class boys will be more delinquent than the official statistics show.

There are two replies to this criticism. First, it is generally recognized that there is a gap of unknown size between "actual" and "known" delinquency. Some students think that few if any adolescent boys in high-rate areas escape delinquency. Second, there is reason to doubt that delinquency is as concentrated among lower-class males as Cohen had argued in his book; and Cohen himself now doubts that

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Wood, *Minority-Group Criminality and Cultural Integration*, 37 J. CRIM. L. & CRIMINOLOGY 498 (1947).

Among the books presenting significant research and/or theoretical development are: J. H. BAGOT, JUVENILE DELINQUENCY: A COMPARATIVE STUDY OF THE POSITION IN LIVERPOOL AND ENGLAND AND WALES (1941); A. M. CARR-SAUNDERS, HERMAN MANNHEIM, & E. C. RHODES, YOUNG OFFENDERS (1942); M. P. CARTER & P. JEPHCOTT, THE SOCIAL BACKGROUND OF DELINQUENCY (typescript in the University of Nottingham Library 1954); LEWIS COSER, THE SOCIAL FUNCTIONS OF CONFLICT (1956); DONALD R. CRESSEY, OTHER PEOPLE'S MONEY (1953); ALFRED R. LINDESMITH, OPIATE ADDICTION (1947); HERMAN MANNHEIM, JUVENILE DELINQUENCY IN AN ENGLISH MIDDLETOWN (1948); JOHN B. MAYS, GROWING UP IN THE CITY (1954); GEORG SIMMEL, CONFLICT AND THE WEB OF GROUP-AFFILIATIONS (Kurt H. Wolff transl. 1955); BETTY M. SPINLEY, THE DEPRIVED AND THE PRIVILEGED (1953); LESLIE A. WHITE, THE SCIENCE OF CULTURE (1949); W. F. WHYTE, STREET CORNER SOCIETY (2d ed. 1955).

[111] ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG (1955).

[112] HAROLD A. WILENSKY & CHARLES N. LEBEAUX, INDUSTRIAL SOCIETY AND SOCIAL WELFARE (1957).

delinquency is as class-related as he had once thought. The best evidence that Cohen can find for modifying his position is the research on "reported" delinquency by Short, which will be discussed briefly below.

The second critical question raised concerning the criminal subculture seems, at first reading, to question its very existence.[113] Sykes and Matza show that the delinquent subculture is not completely opposed to the dominant culture. Delinquent boys have values in common with other boys: they experience guilt and shame, respect the "really honest" person and detest the hypocrite, distinguish between those who can be victimized and those who cannot, and accept many of the demands for conformity made by the dominant system of values. Sykes and Matza make a definite contribution to the analysis of human behavior in their concept, "techniques of neutralization" (rationalization), by which they mean the process of reasoning through which the boy goes before his delinquency. It emphasizes that delinquency, being purposive in one way or another, results, in part, from the way in which the individual conceives himself in relation to others.

Grosser's work on the sociology of sexual differences in juvenile delinquency is the only notable contribution in this area.[114] Grosser applied role theory to this problem and analyzed the instrumental and expressive significance of the varieties of delinquent behavior in the content of different sexual roles. If one may damn with faint praise, Grosser's work is infinitely superior to Pollak's on the criminality of women. Pollak found that in their crimes, women were deceitful, deserted their husbands and families, and concealed their crimes.[115]

A small but important study by Mitchell has many implications for theories of delinquency.[116] Mitchell ascertained the informal bases on which officers of the Youth Bureau of the Detroit Police Department decided, during their initial contact with a boy in the street, to handle his case formally or informally. There was a lack of uniformity among the officers studied in relation to the manner in which they handled cases of automobile theft, unarmed robbery, sexual offenses, larceny, and breaking and entering. If the family seemed to the officer to be interested in the boy and if the home was neat, the case tended to be handled informally. Children of "above average" intelligence had a good chance of being referred to an agency. If the boy was respectful to the officer and cooperated, he had a good chance of being released. Most officers would release a child to a church any time an affiliation was acknowledged. A boy large for his age was handled formally: "I refer most big boys to court," said one officer. The last criterion for making a decision

[113] Sykes & Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOCIOLOGICAL REV. 664 (1957).

[114] GEORGE H. GROSSER, JUVENILE DELINQUENCY AND CONTEMPORARY AMERICAN SEX ROLES (unpublished thesis in Harvard University Library 1952); *A Study in the Sex Specificity of Juvenile Delinquency*, a paper read at the meeting of the American Sociological Society, 1955 (to be published).

[115] OTTO POLLAK, THE CRIMINALITY OF WOMEN (1950). Elliott had no trouble in replying to Pollak. MABEL A. ELLIOTT, CRIME IN MODERN SOCIETY 199 (1952).

[116] GEORGE A. MITCHELL, THE YOUTH BUREAU: A SOCIOLOGICAL STUDY (unpublished thesis in Wayne State University Library 1957).

would certainly affect any study of "constitutional psychology" made of delinquents in Detroit.

The theory of white-collar crime, which indicates a class differential in criminality, has helped to re-open the entire problem of the relationship between social class and crime. Most of the studies of the delinquent subculture find that delinquency is a lower-class phenomenon. A highly-sophisticated attack on this problem has developed recently, to a certain extent through dissatisfaction with official statistics. This is a method for obtaining data by sampling directly from children in the community, referred to by Cohen,[117] and employed by Short. The controlling criterion in this is the representativeness of the sample. This means that the children supply the information as to who is delinquent and nondelinquent and what the social and personal correlates of delinquency are. There are many difficulties to be overcome, and the research already published indicates some of them, as it also indicates some of the ways in which they can be overcome. It is a kind of research that has great potential implications for the study of delinquency and a general theory of criminality.[118]

The theory of differential association is presently being tested in reverse. This is an attempt to account for the "good boy" in areas with high rates of delinquency. Some years ago, Dunham reversed the usual question about mental abnormality and crime and addressed himself to the question of how many schizophrenics are criminals. The result was the most revealing study of the relation of insanity (psychosis) to crime published until that time. Practically none of the young schizophrenic males was criminal. In their personal characteristics, they revealed those traits that are revered in adolescent males by the Boy Scouts and the Y. M. C. A.[119]

Dinitz and Reckless have addressed themselves to the question of what is the process through which nondelinquent boys in areas high in delinquency, remain nondelinquent.[120] They found that the major differences between the potentially delinquent and nondelinquent boys to be in self-conception, in type and content of interpersonal relationships, in contact with or conceptions of officials, school, home, and parents, and in choice of companions. Dinitz and Reckless suggest that a "socially appropriate" or inappropriate conception of self and other is the main factor

[117] ALBERT K. COHEN, DELINQUENT BOYS: THE CULTURE OF THE GANG 169 (1955).

[118] Nye & Short, *Scaling Delinquent Behavior*, 22 AM. SOCIOLOGICAL REV. 326 (1956); Nye, Short, & Olson, *Socio-Economic Status and Delinquent Behavior*, 63 AM. J. SOCIOLOGY 381 (1958); Short & Nye, *The Extent of Unrecorded Juvenile Delinquency* (to be published in a forthcoming issue of the *Journal of Criminal Law, Criminology, and Police Science*); *Reported Behavior as a Criterion of Delinquent Behavior*, 5 SOCIAL PROBLEMS 207 (1958).

[119] Dunham, *The Schizophrene and Criminal Behavior*, 4 AM. SOCIOLOGICAL REV. 352 (1939).

[120] Reckless, Dinitz, & Murray, *Self Concept as an Insulator Against Delinquency*, 21 AM. SOCIOLOGICAL REV. 744 (1956); *The "Good" Boy in a High Delinquency Area*, 48 J. CRIM. L., C. & P.S. 18 (1957); Dinitz, Reckless, & Kay, *Delinquency Proneness and School Achievement*, 36 ED. RES. BULL. 131 (1957); *The Self Component in Potential Delinquency and Potential Non-Delinquency*, 22 AM. SOCIOLOGICAL REV. 566 (1957). See also Short, *Differential Association with Delinquent Friends and Delinquent Behavior*, 1 PAC. SOCIOLOGICAL REV. 20 (1958).

influencing a youth away from or toward delinquency. This hypothesis should explain not only delinquency, but also the "good" boys in high-delinquency areas and the delinquent youth in the low-delinquency area. It will be recognized that in this research, Dinitz and Reckless commit themselves to the symbolic interactionist school of social psychology. They are, incidentally, dealing with the concept *cause* in this research, which is far removed from the "risks" that Reckless was so fond of in *The Crime Problem*.

There has been a convergence of research and theory in criminology and social psychology, as indicated by the work of Dinitz and Reckless. Another contribution has been made by Glaser, which generalizes the kind of work performed by the former two on "good" boys. Glaser employs the concepts of self, other, role, identification, and reference group to meet objections raised to the theory of differential association.[121] The conception of behavior as role-playing presents individuals as directing their actions on the basis of their conceptions of how others conceive them. The choice of another person or group, from whose perspective one's own behavior is viewed, is the process of identification. It is the identification *of* self and *with* the other. The other may be real or imaginary, physically present or absent, a person or a group. We may be loyal, said Cooley, to a higher morality than that of the present. The process of rationalization—the defining of self and other in the context of the given situation—is necessary to voluntary behavior, particularly when one must choose between competing roles. Role-imagery, Glaser shows, provides the most comprehensive and interconnected theoretical framework for explaining the phenomena of criminality.[122]

The identification of self with one or another person or group and the selection of a role is referred to by Glaser as "differential identification," and is employed to meet two objections to differential association. First, some critics have interpreted "association" in Sutherland's writings as synonymous with "contact," which seems to have dismayed him.[123] Thus, the question may be asked, why prison guards and wardens do not become confirmed criminals. Cressey has also said that differential association clearly implies differential identification as a congruent aspect. Second, it is held that differential association cannot account for crimes due to accident, transitory situations, and personality—the last assuming that the major aspects of personality determining crime are fixed in childhood. But a conception of personality as the organization of one's roles, including those that develop largely in adulthood (class and occupation, for example) meets this objection. In this conception, criminality itself is a component of personality. Thus, the theory explaining criminality can be the theory explaining other components of personality. If differential association is reconceptualized into the terms of differential identification, the

[121] Glaser, *Criminality Theories and Behavioral Images*, 61 AM. J. SOCIOLOGY 433 (1956).

[122] See also Foote, *Identification as the Basis for a Theory of Motivation*, 16 AM. SOCIOLOGICAL REV. 14 (1951); Shibutani, *Reference Groups as Perspectives*, 60 AM. J. SOCIOLOGY 562 (1955). The study by Sykes & Matza, *supra* note 113, is another contribution to the present development.

[123] EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 157 n. 25 (4th ed. 1947).

"accidental" and the "transitory situation" may also be accounted for, with the exception, of course, of those events that are actually accidental.

Glaser's theory of differential identification is, in essence, as follows: a person pursues criminal behavior to the extent that he identifies himself with real or imaginary persons from whose perspective his criminal behavior seems acceptable. It is a major contribution to a general theory of criminality.

VII

Until 1955, textbooks in criminology were two books within two covers. The first dealt with criminology—that is, theories of causation that were presented until 1939 in a mismash of eclecticism. The second book dealt with penology, now referred to as "corrections." The two books were usually separated by several inadequate chapters on the police and the courts and also by few or more mutually-exclusive theories and conclusions. The fifth edition of Sutherland's *Principles of Criminology*, revised by Donald R. Cressey, was the first time that an integration of criminology and corrections was attempted, so as to present a viewpoint consistent throughout the two parts of the book. This was a result of the attempt to develop a generalizing theory in sociological terms. The chapter on "The Prison Community" is one of the most important contributions of Cressey to that volume.

The emphasis on research and the attempt to develop an integrative theory have given a tremendous impetus to sociological research in corrections, a term that includes what was until recently "penology," as well as probation, parole, "treatment," prevention, and any other community endeavor having to do with crime. It must suffice to state here that the recent research in the field of corrections has both assumed and demonstrated, within any correctional institution, the existence of a social system with a certain cultural content, having relations with other social systems in the society as a whole, and to which the convicted offender must adjust and within which he can have some kind of function and on which he can have a more or less limited effect. The important concepts are those that are also important in current criminology: subculture, social organization, role, communication, motivation, self-conception, and the like. One series of investigations has studied the prison from the viewpoint of social control, examined the administrative problems of a treatment-oriented prison and the problems of the professional personnel and guards in such a prison, conceived the prison as a social system, conceived it as a system of power, conceived it as a system of social roles, and analyzed the organizational problems faced by departments of probation and parole when they attempt to professionalize the staff.[124]

[124] Soon to be published, these papers will have an enormous influence, not only in the field of criminology and correction, but in the general field of sociological theory.

The papers are: Cloward, *Social Control in the Prison;* Cressey, *The Professional and the Guard in the Treatment-Oriented Prison; Organizational Limitations on Administration of Treatment in the Treatment-Oriented Prison;* Grosser, *The Prison as a Social System;* McCleery, *Communication and Power in a Prison Community;* Sykes & Messinger, *The Inmate Social System;* Ohlin & Pappenfort, *Social Change and Organizational Succession.* Each of these studies has an extensive bibliography.

Some books that conceive the prison as a community and a social system, and which fall within this

VIII

The previous discussion has revealed several instances of sociological imperialism. It has been implied that biology, under the guise of constitutional psychology, should abandon criminology, at least until it is able to adduce biological (or genetic) evidence to support its speculations, instead of the behavioral evidence upon which it has depended until now. Clinical psychology has also been invited to abandon the field on two grounds. First, it has been maintained that most cases of mental retardation (the garden-variety) are explicable in social psychological terms. Second, "personal" factors have been shown to be biological, or neurological, or social-psychological, or statistical. Jurisprudence has been impliedly invited to re-examine its philosophy of administrative, civil, and criminal proceedings so as to align them with the reality of crime. Sociologists have been admonished to abandon their paste-pot-and-scissors eclecticism and to try to develop a generalizing theory that is in keeping with the philosophy of science. Perhaps the theory of differential association (and differential identification) has been so vigorously attacked by so many sociologists because it revealed them to be just about anything but sociologists.

The last trend to be considered in this critique attacks the stronghold of that holy of holies, psychiatry, which is perhaps the last remnant of the medieval absolutist control over the destiny of the individual. This trend establishes the sociological and social-psychological claim for the explanation of the sexual offender and the so-called compulsive criminal, as exemplified in crimes of passion, kleptomania, incendiarism, and the like. In two studies, Sutherland called into question the assumptions on which psychiatry had justified the enactment of sexual psychopath laws in some twenty-two states in this country.[125] A number of state commissions on which sociologists served, as directors, or consultants, or members, were likewise critical of the attempts of psychiatry to establish and maintain exclusive jurisdiction over all types of sexual offenders, from the innocuous voyeurs and exhibitionists to

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trend of research, are: DONALD CLEMMER, THE PRISON COMMUNITY (rev. ed. 1958); LLOYD W. MCCORKLE, ALBERT ELIAS, & F. LOVELL BIXBY, THE HIGHFIELDS STORY (1958); LLOYD E. OHLIN, SOCIOLOGY AND THE FIELD OF CORRECTIONS (1956); GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939); RICHARD MCCLEERY, THE STRANGE JOURNEY (1953); POLICY CHANGE IN PRISON MANAGEMENT (1957).

Some relevant articles are: Adamson & Dunham, *Clinical Treatment of Male Delinquents: A Case Study in Effort and Result*, 21 AM. SOCIOLOGICAL REV. 312 (1956); Cressey, *The State of Criminal Statistics*, 3 N.P.P.A.J. 230 (1957); *Rehabilitation Theory and Reality*, Cal. Youth Authority Q. no. 3, p. 40 (1957); Cressey & Krassowski, *Inmate Organization and Anomie in American Prisons and Soviet Labor Camps*, 5 SOCIAL PROBLEMS 217 (1958); Diana, *Is Casework in Probation Necessary?*, 34 FOCUS 1 (1955); Dunham & Knauer, *The Juvenile Court in Its Relationship to Adult Criminality*, 32 SOCIAL FORCES 290 (1954); England, *What Is Responsible for Satisfactory Probation and Post-Probation Outcome?*, 47 J. CRIM. L., C. & P.S. 444 (1956); Glaser, *Testing Correctional Decisions*, 45 J. CRIM. L., C., & P.S. 679 (1955); Grosser, *The Role of Informal Inmate Groups in Change of Values*, 5 CHILDREN 25 (1958); Hartung & Floch, *A Social Psychological Analysis of Prison Riots*, 47 J. CRIM. L., C. & P.S. 51 (1956); Hayner & Ash, *The Prisoner Community as a Social Group*, 4 AM. SOCIOLOGICAL REV. 362 (1939); Ohlin, *The Routinization of Correctional Change*, 45 J. CRIM. L., C. & P.S. 400 (1954); Vold, *Does the Prison Reform?*, 293 ANNALS 42 (1954).

[125] Sutherland, *The Sexual Psychopath Laws*, 40 J. CRIM. L. & CRIMINOLOGY 543 (1950), reprinted in COHEN, LINDESMITH, & SCHUESSLER, *op. cit. supra* note 15, at 185; *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOCIOLOGY 142 (1950).

the brutal assaults sometimes (rarely) committed during a rape-murder.[126] As a result of his research, Bowman came to the conclusion that:[127]

> It now appears that psychiatry has been oversold in its legal efforts to define the term sexual psychopath; to predict potentially dangerous sex offenders; and to obtain permanent cures through effective methods of treatment.

Floch, without meaning to be cynical, argues that the difference between acquittal on a plea of temporary insanity and conviction on some charge of assault, is very often no more than the difference between a defendant who can pay a psychiatrist's fee and a defendant who cannot.[128]

The most cogent statement of the claim that sexual offenders, the "temporarily insane," and the "compulsive" acts of kleptomania and incendiarism are motivated through the same social psychological processes as other acts, has been developed by Cressey.[129] In a very complex article, employing the social psychological meanings of the concepts motivation, role-playing, and identification, Cressey shows that supposedly compulsive crimes have a motivational and developmental history; that they involve the use of symbolism (linguistic constructs); and that they, therefore, do not constitute exceptions to the theory of differential association and identification. One may add that an easy way to embarrass a psychiatrist or psychoanalyst who employs the term is to ask him to define a compulsive act and to distinguish logically between "compulsion" and "habit."[130]

One result of the criminological concern with the dynamics of human behavior is the beginning of a reappreciation of the rational quality of even the most routine and ordinary actions of our daily life.

It can be said that the sociological approach to criminology is today in a state of ferment.

[126] H. WARREN DUNHAM, CRUCIAL ISSUES IN THE TREATMENT AND CONTROL OF SEXUAL DEVIATION IN THE COMMUNITY (1951); PAUL W. TAPPAN, THE HABITUAL SEX OFFENDER (1951); ILL. COMM'N ON SEX OFFENDERS, REPORT (1953); FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH (1954).

[127] Bowman, *Review of Sex Legislation and Control of Sex Offenders in the United States of America*, in FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH 20 (1954).

[128] Floch, *The Concept of Temporary Insanity Viewed by a Criminologist*, 45 J. CRIM. L., C. & P.S. 685 (1955).

[129] Cressey, *The Differential Association Theory and Compulsive Crimes*, 45 J. CRIM. L., C. & P.S. 29 (1954). Some sociologists accept the concept of compulsive crimes openly. Reckless attempts to conceal it under the phrases "crime of the moment" and "eruptive behavior." WALTER C. RECKLESS, THE CRIME PROBLEM 73 (2d ed. 1955).

[130] Even Lundberg, Schrag, and Larsen find it both necessary and possible to genuflect before psychiatry, in their discussion of "Psychiatric Study of William Heirens." GEORGE A. LUNDBERG, CLARENCE C. SCHRAG, & OTTO N. LARSEN, SOCIOLOGY 340-44 (rev. ed. 1958).

WHITE-COLLAR CRIME

DONALD J. NEWMAN*

I

INTRODUCTION

Possibly the most significant recent development in criminology, especially since World War II, has been the emergence of the concept "white-collar" crime as an area of scientific inquiry and theoretical speculation. It is true, of course, that this crime itself is not wholly new; robber barons have been exposed in the past, and muckrakers have long decried corruption and venality in high places. But the generalization of such phenomena and the incorporation of facts concerning illegal behavior of the higher classes into theories of crime causation is a product of recent effort. The speeches and publications of Edwin Sutherland culminating in his 1949 study[1] not only gave the name "white-collar" to this new area, but stimulated widespread research and, not incidentally, caused a furor in criminological circles concerning the appropriateness of this concept as a legitimate focus of research and theory.

White-collar crime is markedly different both legally and sociologically from more conventional crime, and the controversy over its criminological appropriateness centers around three major issues:

1. Are the law violations in question really crimes?

2. Can the behavior of the offenders involved be equated with conceptual meanings of criminal behavior, particularly since violators neither think of themselves nor are commonly thought of as criminals?

3. What is to be gained, other than confusion and imprecision, by the reformulation of definitions of crime to include behavior customarily "punished" civilly or by administrative action rather than by the conventional, and probably more precise, criminal procedures?

However these questions are answered, no one can deny that every single recent textbook in criminology includes a comprehensive discussion of white-collar crime. Included also, as inevitable as the concept itself, are the arguments, pro and con, about the criminal nature of this form of lawbreaking. The majority opinion of these sociological writers seems to be that white-collar criminality is a legitimate area

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[1] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949). This study of Sutherland's was preceded by a number of his articles dealing with the general significance of white-collar crime, and he had stated his thesis in *White Collar Criminality*, 5 AM. SOCIOLOGICAL REV. 1 (1940), and in an address before the American Sociological Society ten years before his book was published.

of criminological research, although it is customarily set apart as a special type or "behavior system" of crime. While many of the criticisms of such inclusion remain essentially unanswered and all writers recognize the theoretical import and research problems of broadening the concept of crime, none can ignore the numerous research studies and monographs which have appeared in recent years. The studies of Sutherland,[2] Clinard,[3] Hartung,[4] Lane,[5] Cressey,[6] and Newman,[7] the cases described by Irey and Slocum,[8] and various papers on the frequency of lawbreaking among "respectable" segments of our population[9] have supported the general thesis of white-collar criminality.

The relative recency of this interest in what Morris calls "upperworld" crime[10] is the result of the convergence of many cultural factors in our time and place. In the first place, contemporary society has necessarily created legislation specifically designed to control economic and political activities and, therefore, particularly aimed at the more powerful social classes. Rapid industrialization, urbanization, the replacement of the entrepreneur by the corporation, and the development of labor unions and cooperatives have all combined to give us a new world requiring new means of social control. We have come to realize that the conventional laws regarding theft and other socially-injurious conduct are inapplicable or ineffective today in many very important relationships. Some cherished common-law principles—*e.g., caveat emptor,* the fellow-servant doctrine, and so on—have been necessarily reversed or revised by the demands of industrial society. From the late nineteenth century to the present day, a major legal trend has been the development of administrative or regulatory laws designed to control commercial dealings and to codify industrial obligations. Deviations from these laws form the basis of white-collar crime.

In addition to this legal trend, the interest in white-collar crime is a result of a maturity, of both theory and method, within the field of sociology. Early criminologists oriented themselves to the "pathologies" of the social system, taking conventional definitions of societal "diseases" and offering conventional "cures." Criminals were "convicts," and cause lay in personal pathologies or individual environmental defects. In this, these writers reflected their own class values and their training, as well as the spirit of the times.[11]

[2] *Ibid.* See also ALBERT COHEN, ALFRED LINDESMITH, & KARL SCHUESSLER (EDS.), THE SUTHERLAND PAPERS (1956).

[3] MARSHALL B. CLINARD, THE BLACK MARKET (1952).

[4] Hartung, *White-Collar Offenses in the Wholesale Meat Industry in Detroit,* 56 AM. J. SOCIOLOGY 25 (1950).

[5] Lane, *Why Business Men Violate the Law,* 44 J. CRIM. L., C. & P.S. 151 (1953).

[6] DONALD R. CRESSEY, OTHER PEOPLE'S MONEY (1953). Cressey, however, limits his definition of criminality to violation of the penal law. See his *Criminological Research and the Definition of Crimes,* 56 AM. J. SOCIOLOGY 546 (1951).

[7] Newman, *Public Attitudes Toward a Form of White Collar Crime,* 4 SOCIAL PROBLEMS 228 (1957).

[8] ELMER L. IREY & WILLIAM SLOCUM, THE TAX DODGERS (1948).

[9] For examples see Wallerstein & Wyle, *Our Law-Abiding Law-Breakers,* 25 PROBATION 107 (1947); Peterson, *Why Honest People Steal,* 38 J. CRIM. L. & CRIMINOLOGY 94 (1947).

[10] ALBERT MORRIS, CRIMINOLOGY (1934).

[11] See especially, Mills, *The Professional Ideology of Social Pathologists,* 49 AM. J. SOCIOLOGY 165 (1944); GEORGE B. VOLD, THEORETICAL CRIMINOLOGY (1958).

It is probably a truism that the more any type of behavior is studied, the less clear-cut, the less distinct, it becomes. So it is with crime. Criticism of inmate samples, rejection of personal pathology theories, the blending of data from social class and social psychological research all aided, even forced, the criminologist to revise some of his postulates. The conception of "degrees" of "deviation" from legal norms took the place of a criminal, noncriminal dichotomy.[12] A broadening interest was generated, too, by the sociological concern with institutions and the structural-functional theories of social systems. Crime came to be viewed as normative within various contexts. Merton said "certain phases of social structure generate the circumstances in which infringement of social codes constitutes a normal response"[13] and elaborated the thesis of illegality as a "latent" function of political and economic organization.[14] The increase of regulatory laws during the depression of the 'thirties and the war years of the 'forties merged with changing sociological concepts to form the context from which interest in white-collar criminality developed.

II

THE NATURE OF WHITE-COLLAR CRIME

A. White-Collar Crime Defined

The chief criterion for a crime to be "white-collar" is that it occurs as a part of, or a deviation from, the violator's occupational role. Technically, this is more crucial than the type of law violated or the relative prestige of the violator, although these factors have necessarily come to be major issues in the white-collar controversy, first, because *most* of the laws involved are not p[illegible] of the traditional criminal code, and second, because *most* of the violators are a cut above the ordinary criminal in social standing. Such crimes as embezzlement, larceny by bailee, certain forgeries, and the like, however, are essentially occupational and thus white-collar crimes, and yet are tried under the penal code. Likewise farmers, repairmen, and others in essentially nonwhite-collar occupations could, through such illegalities as watering milk for public consumption, making unnecessary "repairs" on television sets, and so forth, be classified as white-collar violators. Conversely, however, members of high-status white-collar occupations who commit ordinary penal law violations, such as murder, robbery, rape, nonoccupationally-connected thefts, and the like, would not be white-collar criminals.

All this adds confusion to the concept but has limited applicability in that the vast bulk of white-collar legislation is regulatory rather than penal in philosophy, is administrative in procedure, and by its qualifications is directed chiefly toward the business and professional classes of our society. This is apparent in the widely-accepted definition by Sutherland that a white-collar crime is "a crime committed

[12] See especially, MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR (1957), and EDWIN LEMERT, SOCIAL PATHOLOGY (1951), for systematic analyses of this approach.

[13] MERTON, *Social Structure and Andmie*, 3 AM. SOCIOLOGICAL REV. 672 (1938).

[14] ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 78-80 (1949).

by a person of respectability and high social status in the course of his occupation."[15] These crimes are usually violations of trust, either "duplicities" or "misrepresentations," placed in the person (or the corporation, for that matter) by virtue of his occupational norms and high position in the society.[16]

Of course, these violations of trust must also be violations of law, and not merely unethical practices or noncriminal deviations from informal conduct norms within a business or profession. And around the legal status of such violations has arisen a theoretical conflict that continues to the present day. Are such trust violations really crimes? Must theories be revised to include these lawbreakers? If these questions are answered affirmatively, then, indeed, the science of criminology must revise its postulates and reformulate many of its theories.

B. The Legal Basis of White-Collar Crime

The majority of laws underlying white-collar crime differ from conventional criminal laws in five ways: (1) in origin, (2) in determination of responsibility, or intent, (3) in philosophy, (4) in enforcement and trial procedure, and (5) in sanctions used to punish violators. In the first place, most white-collar laws have been legislatively-created as of a given date, and some of them are in derogation of common-law principles. These, then, are *mala prohibita,* crimes created by legislative bodies, in contrast to most of the conventional criminal code, which is viewed as merely a legislative expression of "natural" crimes, *mala in se*. Secondly, most regulatory laws define their violations as misdemeanors rather than the implicitly more serious felonies of penal law. Furthermore, the question of intent, so prominent in the criminal code, is irrelevant to conviction under many regulatory laws, although intentional violations, if proved, may increase the punishment. In these respects, white-collar violations are legally much more like traffic laws and municipal ordinances than statutes of the criminal code.

The legal distinctiveness of white-collar legislation is seen even more clearly in procedural variations from those more commonly used in conventional criminal cases. Most of the federal regulatory legislation and much of its counterpart on state levels rely for enforcement not on the police and public prosecutors, but on specially-created investigatory and enforcement bodies. Probably the most familiar of these is the Bureau of Internal Revenue, but many similar agencies exist within the framework of other legislation. Of course, in the final analysis, police and the criminal court *can* be used, but in general, the enforcement of such laws is not a common police activity.

In white-collar legislation, the same agency or commission which directs investigation also conducts hearings on cases and administers numerous punishments or sanctions short of prison terms or the other more conventional penal sanctions. In a strict sense, these hearings are not trials, and, therefore, the formal criminal procedures are often absent, as, indeed, are the many protections given defendants in

[15] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 2 (1949).
[16] SUTHERLAND, *White Collar Criminality*, 5 AM. SOCIOLOGICAL REV. 1, at 2 (1940).

criminal proceedings. Of course, the findings of such hearings may be appealed to conventional courts, and here the precise, if more cumbersome, formal procedural rules apply. This administrative process of investigation and hearing parallels more closely the practices in juvenile court than those in its criminal counterpart.

Since laws proscribing *mala prohibita* are remedial in nature, they are liberally construed, so that the goal remains prevention or correction of existing illegalities rather than the repression or punishment of violators. In this respect, various sanctions other than the criminal punishments of imprisonment, probation, and fines are used by the enforcing agencies. Violators of such laws may be subjected to warnings; injunctions; consent decrees; seizure and destruction of products; civil suits for damages, like the treble-damage suits sanctioned in the case of OPA violations during the wartime emergency; license revocation, where applicable; and similar informal or civil processes. Legislation also provides for the use of more traditional sanctions by criminal courts, however, in cases warranting such action. The discretion to press criminal charges rather than civil action is another function of the enforcing agency. Sutherland's survey of the records of seventy large corporations showed a total of 980 adverse decisions against these companies, 158 of which were criminal proceedings, 298 made by civil courts, 129 by equity courts, while the remainder were administrative actions discussed above.[17] Likewise, Clinard's extensive study of rationing and price violations, the "black market" of war years, illustrated the use of criminal sanctions in about six per cent of OPA cases.[18]

The relatively infrequent use of criminal sanctions is undoubtedly a reflection of many factors, including the high social status of many violators and the lack of consensus about the "criminal nature" of their behavior, but it is also consistent with the remedial philosophy of the laws in question. Since the purported aim of enforcement is to correct economic wrongs, prevent public injury, and the like, cases are more likely "settled" or wrongs prevented from continuing in contrast to the eye-for-eye philosophy implicit in conventional criminal actions. Certainly, burglars and bank-robbers are not merely "warned" nor issued cease-and-desist orders.

Then, too, the conventional criminal law is based on a theory of individual responsibility and guilt, the *mens rea* nature of intent, that is inconsistent with and difficult to apply in many white-collar cases. Quite often, white-collar violators are corporations, cooperatives, or labor unions, and while legal responsibility may fix to a corporation as it does to a person, the use of the criminal sanctions of imprisonment or probation is virtually impossible in such cases. The diffuse nature of the perpetrator (the corporate body), as well as the diffuse nature of the victim (the public), does not fit many white-collar cases to the usual criminal format. Then, too, the virtual absence of the necessity of intent, of *mens rea,* on the part of violators makes criminal sanctions seem inappropriate.[19]

[17] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 22 (1949).

[18] MARSHALL B. CLINARD, THE BLACK MARKET 238 (1952).

[19] See JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW c. 10 (1947), for a discussion of intent.

Of course, in any behavioral definition of crime, the focus is not on behavior *tried,* but on behavior *triable*. Sutherland puts it "An unlawful act is not defined as criminal by the fact that it is punished, but by the fact that it is punishable."[20] This means that while one person may be tried in a criminal court for behavior remarkably similar to that of another which, at the discretion of the investigating agency, results only in a civil suit or a warning, both would be "criminals," since the emphasis is on the behavior in question rather than the formality of legal process.

III

ARE WHITE-COLLAR VIOLATORS CRIMINALS?

A. Legal and Sociological Opposition to the Concept of White-Collar Crime

The very narrowest legal conceptions of the criminal view him not only as a person who has engaged in acts or omissions forbidden by the penal law, but as a person *convicted* by due process. Hence, the unapprehended or undetected violator is not a criminal for either "practical" or "theoretical" purposes.[21] Vold comments on such rigid conceptions saying:[22]

> . . . such definitions are purely formal and a matter of logic and verbal consistency. They are of little assistance in helping to understand problems of crime causation. All that is really said is that law is the immediate cause of crime, since without the formal legal definition there would be no crime, regardless of the behavior involved. This is reflexive circularity that leads nowhere.

Most criminologists today would not feel bound to limit their interest to *convicted* felons. These are obviously select offenders, reflecting what Reckless has called "categoric risk" of conviction[23] more than actual, representative criminality. Nevertheless, the inclusion of violators of regulatory laws within functional definitions of criminal behavior has been vigorously opposed on both legal and behavioristic grounds.

From a strictly legal point of view, white-collar lawbreakers handled by administrative action outside of penal law jurisdiction would not be criminals, not even misdemeanants, since they have no criminal record. Perhaps their behavior is not ethical or is even damaging in a civil sense, but it is not criminal. Consequently, it is presumptuous to meld white-collar cases decided by criminal courts with cases involving administrative decisions into one large sample and label it crime. It is an error compounded to equate this collection with the conventional larceny and burglary convictions under the criminal code, for these latter violations are deliberate, and even malicious, whereas no "wilful intent" has been or need be, demonstrated in many white-collar convictions. A manufacturer who distributes to the public an adulterated food product in violation of the Food, Drug and Cosmetic Act could possibly be

[20] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 35 (1949).

[21] For a positive statement of the necessity of criminal court conviction as the basis of "crime," see JEROME MICHAEL & MORTIMER ADLER, CRIME, LAW AND SOCIAL SCIENCE c. 1 (1933).

[22] VOLD, *op. cit. supra* note 11, at 268.

[23] WALTER C. RECKLESS, THE CRIME PROBLEM c. 3 (2d ed. 1955).

sentenced to imprisonment, although the adulteration might be an honest mistake or an "act of God" rather than the result of intentional or negligent behavior on his part. This imprisonment would be unlikely, of course, because the Food and Drug Administration, like other regulative bodies, does not ordinarily rely on criminal convictions and severe sentences for control.[24] Nevertheless, *caveat vendor,* it would be possible to produce an "accidental" criminal under such legislation.

The legal argument against the inclusion of white-collar crime has been most forcefully stated by Professor Tappan who says:[25]

> Vague, omnibus concepts defining crime are a blight upon either a legal system or a system of sociology that strive to be objective. They allow judge, administrator, or—conceivably—sociologist, in an undirected, freely operating discretion, to attribute the status "criminal" to any individual or class which he conceives nefarious. This can accomplish no desirable objective, either politically or sociologically. . . . (The) law has defined with greater clarity and precision the conduct which is criminal than our anti-legalistic criminologists promise to do; it has moreover promoted a stability, a security and dependability of justice through it exactness, its so-called technicalities, and its moderation in inspecting proposals for change.

Interestingly, some sociologists, while rejecting the legal basis of this opinion, concur with its general conclusion.[26] Burgess, in commenting on Hartung's study of violations in the Detroit wholesale meat industry, maintains that while violations of administrative action, health ordinances, and the like may technically be called crimes, the offenders cannot be justifiably included in studies of criminals because:[27]

(1) The offenders do not conceive of themselves as criminals.
(2) These administrative laws are suddenly imposed on businessmen making acts which were previously non-criminal, criminal overnight.
(3) There is no organized effort on the part of civil leaders, churches, schools, the press and even governmental agencies to apply social condemnation to these violations.
(4) If all such persons violating traffic regulations, health ordinances, and other administrative acts, are to be considered criminal, then the number of criminals in the population would greatly outweigh those who have never committed such offenses.

Sociologists, perhaps less concerned with semantic limitations of their field than lawyers, have argued that crime, like all "deviant" or "problem" behavior, must be viewed in its entire cultural context. They are less concerned with textbook definitions of crime than with the meaning given to the behavior by the general community. Pointing out, and correctly, that all behavior which is defined as criminal

[24] Section 306 of the 1938 revised Food, Drug and Cosmetic Act reads: "Nothing in this act shall be construed as requiring the Administrator to report for prosecution . . . minor violations of the act whenever he believes that the public interest will be adequately served by a suitable written notice or warning." 52 STAT. 1045 (1938), 21 U.S.C. § 336 (1952). See FEDERAL SECURITY AGENCY, FEDERAL FOOD, DRUG AND COSMETIC ACT AND GENERAL REGULATION FOR ITS ENFORCEMENT 7 (1949).

[25] Tappan, *Who Is the Criminal?,* 12 AM. SOCIOLOGICAL REV. 96, 99-100 (1957). See also Caldwell, *A Re-examination of the Concept of White-Collar Crime,* Fed. Prob., March 1958, p. 30.

[26] For a general discussion of such conflict, see Clinard, *Sociologists and American Criminology,* 41 J. CRIM. L. & CRIMINOLOGY 564 (1951).

[27] Burgess, *Comment on Hartung, "White Collar Offenses in the Wholesale Meat Industry in Detroit,"* 56 AM. J. SOCIOLOGY 32-33 (1950).

is culturally relative rather than "natural," they look in historical context to the values, the mores, of societies to delimit deviant behavior.[28] In this respect, some writers have pointed to the cultural inconsistencies inherent in the concept of "respectable criminals." After all, what is "respectable" is culturally as significant as behavior defined as "criminal." Vold says: "Attribution of high status is made by the same community that decides whether and to what extent specific misconduct shall be called 'crime,' and to what extent it shall be subjected to criminal or to civil procedure."[29] Certainly, not all law infractions would be, or are, considered by the community to be crimes. Whether or not the researcher defines white-collar violations as crimes will depend, Aubert believes, "upon how much one wants to get rid of these white collar activities"[30] rather than on any general consensus about their criminal nature.

Thus, while some opponents of the criminal definition of white-collar offenses argue that the violations in question are not really crimes from a legalistic point of view, others admit that technically such actions may be "legal" crimes but demur that the behavior in question is not "sociologically" criminal because neither the offenders themselves nor the mores define it so. While admitting that regulatory laws and deviations from these laws have a good deal of sociological relevance, such critics would presumably limit criminological activity to the study of conventional law violations.

B. Advocates of the Concept of White-Collar Crime

Those sociological writers who advocate the inclusion of upperworld violations in criminological context admit the uniqueness of regulatory law and the class differential between white-collar and ordinary criminals. The differences they see, however, are viewed as differences of degree, not of kind. Sutherland stated the majority position when he said:[31]

> White-collar crime is real crime. It is not ordinarily called crime, and calling it by this name does not make it worse, just as refraining from calling it crime does not make it better than it otherwise would be. It is called crime here in order to bring it within the scope of criminology, which is justified because it is in violation of the criminal law. The crucial question in this analysis is the criterion of violation of the criminal law. Conviction in the criminal court, which is sometimes suggested as the criterion, is not adequate because a large proportion of those who commit crimes are not convicted in criminal courts.

The inclusionists are well aware of the criticisms of their position and attempt to meet them. They are aware, too, of the significance of inclusion of white-collar crime in criminological theory but argue that unless the definition of crime is ex-

[28] For a discussion of this, see THORSTEN SELLIN, CULTURE CONFLICT AND CRIME cc. 1, 2 (SSRC Bull. No. 41, 1938).

[29] VOLD, *op. cit. supra* note 11, at 254-55.

[30] Aubert, *White Collar Crime and Social Structure*, 58 AM. J. SOCIOLOGY 263 (1952).

[31] Sutherland, *White Collar Criminality*, 5 AM. SOCIOLOGICAL REV. 1, at 5 (1940).

panded, criminology will remain legalistically-bound, class-biased, and unable to develop accurate, inclusive theories of lawbreaking.[32]

Meeting various criticisms of inclusion, advocates of the white-collar-crime concept point out that the laws in question are at least partially penal, having provision for criminal court action and conventional criminal sanctions at agency discretion. The fact that civil and administrative actions can also be used is a reflection of the remedial intent of regulatory legislation, but this does not lessen the fact that deviations from the law are *triable* in criminal court. Furthermore, many of the nonpenal actions taken in some cases are, in fact, punishments, although not the traditional ones imposed on ordinary criminals. Sutherland argues not only that many administrative actions were legislatively designed to punish offending corporations, but that the corporations themselves define the actions as punishments and seek to evade them. The major element in the punishment is "public shame, which is an important aspect of all punishments."[33] The emergence of the corporate criminal merely made imprisonment inappropriate as punishment, so other devices are used. New sanctions must be developed to meet new conditions of violation and new philosophies of law. It would be ridiculous to argue, for example, that a thief sent to prison today would not have been a thief by seventeenth century standards solely because he is not mutilated or branded.

The criticism that white-collar crime exists only by arbitrary legislative action, in contradistinction to the more serious, "natural" crimes, is met by a challenge of the *malum prohibitum-malum in se* and the misdemeanor-felony dichotomies. These dichotomies are unstable at best. What is *malum in se* is essentially subjective, and the lack of universality of any criminal act results in a variety of definitions of felonies from one area to another and one period of time to another.[34] Furthermore, white-collar crimes are ordinarily far from arbitrary; most of them have roots in the common law and merely reflect an application of common-law principles regarding theft, fraud, and the like to modern social and economic institutions.[35] Presumably, however, crimes "by nature," including most felonies in the criminal code, are more serious than legislated crimes and require more severe measures of control.

The relative seriousness of crimes has been a debatable issue since the time of Beccaria. If by seriousness is meant the harm done to individual and public welfare or public order, as is generally intended, then advocates of the white-collar-crime concept have a strong case. Financial losses to victims of embezzlements, fraudulent financial manipulations, the formation of illegal monopolies and cartels, false advertising, food adulteration, misbranding, and the like are many times, even hundreds of times, greater than similar losses in conventional criminal cases.[36] Losses in many

[32] MARSHALL B. CLINARD, THE BLACK MARKET 229 (1952).
[33] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 39 (1949).
[34] See MORRIS R. COHEN, REASON AND LAW c. 1 (1950).
[35] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 32-33 (1949).
[36] *Id.* at 12-13. See also ALLEN CHURCHILL, THE INCREDIBLE IVAR KRUEGER (1957), for an account of an international upperworld criminal whose "take" exceeded three billion dollars.

offenses are not limited to money. Physical injury, sickness, and even death have resulted from some fraudulent, and some negligent, white-collar offenses, particularly food, drug, and cosmetic law violations.[37] Violations of wartime price and rationing regulations posed a serious and widespread threat of inflation to our economy and were damaging to many phases of our war effort.[38] Corruptions, frauds, and swindles of various sorts undoubtedly come closer to destroying our economic and political ideologies than all of our conventional crimes combined. How, then, is the "seriousness" of a single crime or a type of crime determined?

Meeting another criticism of inclusion, advocates admit that even though white-collar legislation differs from the conventional criminal code in respect to the importance of wilful intent, the "accidental" violator is rare. Sutherland's study of corporation records indicated the persistent nature of such lawbreaking, 97.1 per cent of his sample being "recidivists" by having two or more adverse convictions or administrative decisions, with an average per corporation of fourteen such decisions.[39] This is hardly accidental. Likewise, Clinard reports not only the deliberate nature of many black market violations, but the high proportion of businessmen who felt that most such violations by their colleagues were, indeed, intentional.[40]

It is admitted by all who study white-collar violators that generally they do not conceive of themselves as criminals, but at most as "lawbreakers" or even, in a traditional rationalization, as "shrewd businessmen." Does this difference from the traditional criminals preclude their inclusion in criminological studies—that is, is self-conception a necessary element in the definition of a criminal? Obviously, no authoritative answer can be given; it is a decision that must be left to each author or researcher in his working definition of criminal. Certainly, an individual's self-conception is of paramount importance to the social psychologist, and this issue is not denied by the advocates of a broadened definition of crime. Stressing the necessity of such a self-conception in a definition of criminal behavior, however, assumes that such behavior is a single entity. Modern criminologists do not study criminal behavior *in toto,* but types of criminal behavior. There is almost as wide a difference in self-conception between the confidence man and the conventional jailbird as between the business offender and the professional thief. Conceiving of oneself as a "criminal" as contrasted to "lawbreaker" or even "nonconformist" ordinarily involves a subjective definition of criminal according to the popular stereotype of the lower-class armed-robber, burglar, or racketeer, or the newsprint description of the murderer. Obviously, the sophisticated ordinary violator, as well as the business offender, cannot logically equate himself with such an image and, in this sense, does not conceive of himself as a criminal. To exclude such individuals from

[37] See ARTHUR KALLET & F. J. SCHLINK, 100,000,000 GUINEA PIGS (1933); RUTH DE FOREST LAMB, AMERICAN CHAMBER OF HORRORS: THE TRUTH ABOUT FOOD AND DRUGS (1936); LELAND J. GORDON, ECONOMICS FOR CONSUMERS 616 (2d ed. 1944).

[38] MARSHALL B. CLINARD, THE BLACK MARKET *passim* (1952).

[39] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 20 (1949).

[40] MARSHALL B. CLINARD, THE BLACK MARKET 235-36 (1952).

criminological studies, however, is not necessarily warranted. Lack of self-conception as a criminal in cases of lawbreakers can be as significant for the modern criminologist as the reverse.

The sociological argument that white-collar crime be excluded from criminological theories because it does not conform to the general cultural meaning of crime cannot be arbitrarily dismissed, but the implied contradiction between the community conferral of "high status" versus the conception of "criminal" may not be as mutually exclusive as claimed. It would be a naïve citizen who failed to be aware of lawbreaking in high places. From Teapot Dome and Ivar Krueger to recent FCC "scandals," Americans have been continually reminded of white-collar rascality. The fact that the stigma of upperworld violations is less severe than in ordinary offenses does not necessarily rule out their criminal nature. Sutherland, arguing that the law is "differentially implemented" in favor of business-class violators, explains this difference by three major factors: (1) the high status of the violators, (2) the trend away from punishment, and (3) the relatively unorganized resentment of the public against white-collar crimes.[41] The exalted social position of many white-collar offenders, coupled as it is with a "combination of fear and admiration," not only allows them to escape conviction and, by their control of the press, social stigma, but accounts for the mild provisions of laws regulating business, since these offenders are influential in the very process of law-making. Furthermore, many white-collar violations are so complex and their effects so indirect that only an accountant or a lawyer can fully appreciate their criminal nature. Then, too, the victim of the white-collar offender is ordinarily that abstraction "the public," which means that the effects of the offense are diffuse and community resentment does not gain momentum. A murder is a clear-cut crime, usually involving one specific victim as well as a single, visible perpetrator. The violence, the directness of murder, engenders social solidarity against the criminal, particularly as long as the press reports every detail. But what of the formation of an illicit monopoly, with complex interlocking corporate structures? Even granting a crime has been committed, who is the criminal; who, the victim? Obviously, public resentment of such offenses must take a different form than in conventional criminal cases, but the very fact that laws forbidding monopoly exist argues for its cultural meaning as crime.

IV

THE SIGNIFICANCE OF WHITE-COLLAR CRIME TO CRIMINOLOGICAL THEORY AND RESEARCH

A. Theoretical Implications of White-Collar Crime

Regardless of the "persuasive" nature of definitions of white-collar crime, it is apparent that criminology must face up to its inclusion. This is not to say that it must be equated with burglary, so that theories relating to burglars are discarded as inadequate by failing to explain corporate violations. Nevertheless, the research on upper-strata criminality must be viewed as a challenge to those particularistic theories

[41] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 46 (1949).

which explain crime in terms of personal inadequacies or essentially lower-class characteristics, such as poverty or poor home life. The challenge is to the generalization of such factors to all criminal behavior, but danger lies in preventing descriptive research on samples of ordinary, lower-strata violators. Low intelligence, poverty, discrimination, personality deviation, and the like may be crucial variables in some *types* of crime, and their absence among white-collar violators should not completely invalidate their usefulness.

Studies of upperworld crime have taken criminology a step closer to the conceptualization of its subject matter as "deviant," rather than disorganized or pathological, behavior. This is in keeping with the general tend in "problem" areas of sociology. Deviant behavior in this framework is approached through a study of social processes common to *all* behavior, with an emphasis on degrees of variations from norms, role conflicts, status differentials, and so forth.[42] In short, this approach casts the problem of conforming *versus* deviant behavior within a broad sociological analysis of culture and of the interaction of personality and subcultural variants. Obviously, white-collar crime is crucial in such a context. Debates about whether such phenomena are "real" crimes become significant in themselves. Aubert comments:[43]

> For purposes of theoretical analysis it is of prime importance to develop and apply concepts which preserve and emphasize the ambiguous nature of white-collar crimes and not to "solve" the problem by classifying them as either "crimes" or "not crimes." Their controversial nature is exactly what makes them so interesting from a sociological point of view and what gives us a clue to important norm conflicts, clashing group interests, and maybe incipient social change.

White-collar legislation represents the major *formal* controls imposed upon the occupational roles of the most powerful members of our society. Whether he likes it or not, the criminologist finds himself involved in an analysis of prestige, power, and differential privilege when he studies upperworld crime. He must be as conversant with data and theories from social stratification as he has been with studies of delinquency and crime within the setting of the urban slum. He must be able to cast his analysis not only in the framework of those who *break* laws, but in the context of those who *make* laws as well. This, of course, necessitates the development of enlarged, if not wholly new, theoretical models. Fortunately, the bibliography of studies of stratification and power is extensive and growing even larger.[44] There remains for the criminologist the task of relating white-collar crime to class differences in interaction, in styles of life, aspirations, child-rearing, mobility patterns,

[42] For a general discussion of this position see MARSHALL B. CLINARD, THE SOCIOLOGY OF DEVIANT BEHAVIOR c. 1, 2 (1957).

[43] Aubert, *supra* note 30, at 264.

[44] See JOSEPH A. KAHL, THE AMERICAN CLASS STRUCTURE (1957), for a description and analysis of many significant studies of social stratification in the United States. For a provocative analysis of power structure, see C. WRIGHT MILLS, THE POWER ELITE (1956), as well as his THE NEW MEN OF POWER: AMERICA'S LABOR LEADERS (1948), and his WHITE COLLAR (1951). For an analysis of upper middle-class values, see DAVID RIESMAN, THE LONELY CROWD (1950).

prestige symbols, and the host of other sociological variables important to the understanding of motives and differential behavior patterns in a multiclass society.

B. Research Methods in the Study of White-Collar Crime

Research problems posed by the concept of white-collar crime are manifold. Criminal statistics do not ordinarily contain data of corporation illegality, and prison samples rarely contain white-collar violators. There is no centralized source which tabulates the extent of, and any trends in, white-collar crime similar to the FBI's *Uniform Crime Reports,* which tabulates ordinary crimes known to the police. Many federal agencies publish decisions in cases under their jurisdiction, however, and such official sources formed the basis of Sutherland's analysis. Clinard's *Black Market* grew out of sources available to him in his wartime position as Chief of the Analysis and Reports Branch of the Office of Price Administration.[45] He utilized case records, field reports, interviews, information from congressional hearings, public-opinion surveys dealing with price regulations, and various other channels of data. The extremely careful documentation of his study reflects the excellence of many of these sources. Hartung interviewed businessmen concerning law violations in the wholesale meat industry,[46] while Newman sampled consumer's responses to actual cases of food adulteration.[47] Lane interviewed top management in twenty-five industrial concerns and analyzed decisions of the Federal Trade Commission, the National Labor Relations Board, and some cases within the Department of Labor.[48] Cressey, on the other hand, narrowed his research to embezzlers and conducted a rather intensive study of these violators who were imprisoned in Illinois, California, and in the federal prison in Terre Haute, Indiana.[49]

Missing from these research techniques are psychometric data, clinical interviews, extensive life histories, matched samples, and the other procedures more familiar to students of ordinary criminal behavior. Many of these techniques may not be applicable to white-collar crime; others are virtually impossible to apply. White-collar *crime* rather than white-collar *criminals* has been the basic orientation in research. At any rate, efforts in this field have been frugal when compared to conventional crime or delinquency and have been devoted in good part to the demonstration of the criminal nature of, and social damage caused by, upperworld lawbreaking. They have not been primarily etiological, although causes have not been completely ignored. In fact, white-collar phenomena have been fitted into or tested against many theories. The emphasis has been, however, on demonstrating the existence and danger of such behavior. Vold argues that implicit in most studies of white-collar crime is an appeal not only to modify criminological theory, but to reform values so that white-collar violations *become* generally defined as reprehensible. He says:[50]

[45] MARSHALL B. CLINARD, THE BLACK MARKET viii-x (1952).
[46] Hartung, *supra* note 4.
[47] Newman, *supra* note 7, at 228-29.
[48] Lane, *supra* note 5.
[49] DONALD R. CRESSEY, OTHER PEOPLE'S MONEY 151 (1953).
[50] VOLD, *op. cit. supra* note 11, at 259.

The persons who argue in favor of the term "white collar crime" are really asking for a change in the cultural attitudes and conceptions of the community as a whole so that such behavior will be considered criminal, rather than be viewed as a kind of misconduct to be handled by noncriminal procedures. The real plea is for a change in the mores basic to attitudes about what is to be considered right or wrong in business practice.

Some sociologists feel that the inclusion of upperclass lawbreaking in criminological theory is still too narrowing. Since the sociological emphasis is on processes in producing deviant *behavior* rather than on defining crime, criminology should not limit itself to formal laws as the norms from which deviation is measured. Conduct which violates *any* group norm should also be studied.

While such an approach undoubtedly has theoretical merit, practical considerations of measuring conduct norms, obtaining consensus on unethical practices, and otherwise discovering behavioral standards from which deviations can be observed pose almost insurmountable problems within the possibilities of present-day research techniques. Deviation from conduct norms is not to be ignored, however, and any future research will surely be welcome, but broadening "crime" to "nonconformity" is at present beyond all but the most speculative hypotheses.

V

THEORIES OF WHITE-COLLAR CRIME

White-collar crime not only challenges particularistic explanations of lawbreaking, but requires a theoretical explanation in itself. Sutherland sought the explanation in his theory of differential association. He explains:[51]

The hypothesis of differential association is that criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behavior if, and only if, the weight of the favorable definitions exceed the weight of the unfavorable definition.

Very roughly, this position puts forth the argument that within certain businesses and occupations, lawbreaking is normative. Incumbents in these occupations, being relatively isolated from possible other association where this criminal activity is not common, learn attitudes, values, motives, rationalizations, and techniques favorable to this type of crime. The normative nature of the lawbreaking is a result of various disorganizing factors within the general culture, such as excessive competition, the emphasis on success rather than the means of succeeding, the impersonality of urban business practices, and the like. In general, this theory views white-collar crime as a natural product of conflicting values within our economic and class structures and the white-collar criminal as an individual who, through associations with colleagues who define their offenses as "normal" if not justified, learns to accept and participate in the antilegal practices of his occupation. The emphasis is on a fundamental

[51] EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 234 (1949).

learning process and does not rely on personality deficiencies as the root of such crime.

Clinard, while agreeing in principle with the differential-association hypothesis, argues that it fails adequately to account for all cases of lawbreaking, at least where black-market violations were concerned, and does not sufficiently account for individual differences in legal conformity within many business enterprises. He feels that more attention should be paid to certain personality traits of individual violators. He says:[52]

> Such a theory does not adequately explain why some individuals who were familiar with the techniques and the rationalizations of black market violations and were frequently associated with persons similarly familiar, did not engage in such practices . . . . [I]t is suggested that *some,* but by no means all, persons tended to accept or reject black market opportunities according to their basic personality make-up. Some of these general personality patterns, which probably were important in accounting, in some instances, for participation, or lack of participation, in the black market, were egocentricity, emotional insecurity or feelings of personal inadequacy, negative attitudes toward other persons in general, the relative importance of status symbols of money as compared with nationalism, and the relative lack of importance of one's personal, family or business reputation.

Walter Reckless, who has often stated the impossibility of developing a single theory to account for all types of crime, looks to individual differences in personalities to explain the white-collar violator. Stressing "differential responses" to similar situations, he says "white collar crime and OPA violations cannot be explained without a personality component, a differential response or inner readiness to break over the lines of compliance."[53]

Robert Lane, answering the question of corporate violation supports, in general, the differential-association hypothesis by pointing to the consistency of law violations in certain firms, even when management has changed several times. He tentatively states: "It seemed to be the position of the firm, rather than any emotional qualities of its management which led it to violate."[54] He does not reject, however, the possible influence which men with varying tolerations of governmental authority may exert on the behavior of their firms.

Not all theoretical effort has been directed to the explanation of differential lawbreaking. Most criminologists, in fact, have been more concerned with accounting for the very existence of upper-strata crime in our society than with variation in offense rates within a business or profession. Hartung suggests that such crime is a result of "social differentiation" rather than disorganization," and points to subcultural value divergencies within a common set of economic and political ideals as the basis of such violations.[55] Taft stresses the "exploitive" nature of our society and

[52] MARSHALL B. CLINARD, THE BLACK MARKET 309, 310 (1952).

[53] RECKLESS, *op. cit. supra* note 23, at 223.

[54] Lane, *supra* note 5, at 163.

[55] FRANK E. HARTUNG, A STUDY IN LAW AND SOCIAL DIFFERENTIATION, AS EXEMPLIFIED IN VIOLATIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AND THE SECOND WAR POWERS ACTS IN THE DETROIT WHOLESALE MEAT INDUSTRY (unpublished Ph.D. thesis in University of Michigan Library 1949).

sees white-collar crime as a mere social-class variation of common motives and practices. He puts it this way:[56]

> American culture demands that we be individualists, conformers, materialists, and so on, but the ways in which we strive for these culturally determined goals are determined by the ways which are approved in these primary groups. The underprivileged slum dweller joining a gang commits the "no-collar" type of crime. The businessman joining Rotary becomes a noncriminal competitor if possible, but a white-collar criminal if such a course is essential to his prestige. Some fortunate people are able to achieve success without exploitation of their fellows, but these, we hold, are a minority, not a majority, because our system well-nigh compels most of us to be exploitative.

White-collar crime cannot be fully understood without a knowledge of the value conflicts implicit in the governmental regulations of business. Contrasted with often-stated ideals of "free competition," the "law of supply and demand," and philosophies of individual success (or failure), the state regulation of commerce is viewed by some as an infringement on basic rights, as unjustified, unnecessary, discriminatory or otherwise contrary to the "American way." Every regulatory law has had a stormy legislative history; most, in fact, represent compromise bills to lessen the dissatisfaction of multiple-interest groups. Quite possibly, many white-collar violations reflect ideological conflicts, how individual offenders or corporations feel about governmental "interference," rather than an acceptance of criminal patterns. White-collar offenses, thus, may represent, in part at least, a protest against what is felt to be "bad" law, similar to violations of prohibition. Vold points to the impossibility of gaining legal conformity unless laws are "accepted and respected by most of the important power groups or elements in the organized political state."[57]

The most important theoretical implication of white-collar crime is that it presents a problem almost exclusively sociological, or at least sociolegal, in nature. Regardless of whether such deviation is "really" crime, it is a highly-significant social problem, reaching to the broadest, but in a way most basic, of our culture patterns. It cannot be explained by somatotypes, infantile regression, low intelligence, psychopathy, broken homes, or the host of other "deprivation" hypotheses. In order to comprehend it at all, a fundamental knowledge of class structure, values, roles and statuses, and the many other essentially social processes and concepts is needed. Criminology has frequently been guilty of studying delinquency and crime out of its culture context or of concentrating, microscopically, on the family as the single, most definitive cultural unit. White-collar crime does not lend itself to such an approach. A great deal more research is needed, of course, but by its very acceptance in criminological circles, white-collar crime will force researchers to explain more thoroughly the relationship of personality to subcultural influences, to make more thoroughgoing explorations of role and role conflicts,[58] and to deal much more comprehensively with social deviation in general.

[56] DONALD R. TAFT, CRIMINOLOGY 339 (3d ed. 1956). [57] VOLD, *op. cit. supra* note 11, at 257.

[58] For an example of exploratory research in this problem, although not in the area of white-collar crime, see NEAL GROSS, WARD S. MASON, & ALEXANDER W. MCEACHERN, EXPLORATIONS IN ROLE ANALYSIS (1958).

VI

THE CONTROL OF WHITE-COLLAR CRIME

We have very little success controlling any kind of crime in our society, as attested by increasing crime rates. Our methods of control have been repressive on the one hand and rehabilitative on the other, with some lip-service to prevention. The punishment of individual lawbreakers is an integral part of our religious and political heredity, just as individual readjustment is a tradition of our public welfare, charitable, and correction programs. Perhaps these two approaches are not mutually exclusive; it cannot be debated here. The traditional forms which each of these philosophies take, however—chiefly imprisonment and public stigma in the first instance and case-work, psychotherapy, vocational training and the like in the latter—are, for the most part, inappropriate in white-collar crime, for reasons already discussed.

The legal philosophy basic to regulatory legislation is essentially remedial rather than punitive. The admitted purpose of administrative agencies is to help individuals and businesses under their jurisdiction comply with the law and, thus, to prevent violations from occurring. Many times, educational, inspectional, and corrective programs supersede enforcement activities of administrative personnel. Perhaps this should not be the case. Would white-collar crime decline if warnings, injunctions, consent decrees, and damage suits were abandoned in favor of the exclusive use of fines, probation, and imprisonment? Clinard reports that imprisonment, even for sentences as short as six months, was the punishment most feared by businessmen, according to their own testimony. The other criminal court sanctions of fines and suspended sentences had little effect in insuring compliance with government OPA regulations.[59] He concludes, however, that punishment, either administrative or criminal, does little to control white-collar offenders, except to increase caution and cleverness in the methods of their evasions. He feels that the only effective control rests on "the voluntary compliance with the regulations of society by the vast majority of the citizens."[60]

Newman reported on public opinion of punishment as a means of control. He hypothesizes that the public—*i.e.*, victims—will punish white-collar violators much more severely than administrative agencies actually do, particularly in cases of food law violations which potentially threaten their own health as well as their pocketbooks. This was, in fact, demonstrated.[61] A second hypothesis, however, to the effect that respondents would select penalties comparable to those meted in ordinary criminal cases (long prison sentences) had to be abandoned. While about one-fifth of the respondents indicated that they would sentence some violators to prison for more than one year, the majority selected fines, warnings, seizures, and jail terms as their judgments. The conclusion was: "In effect, respondents viewed food adultera-

[59] MARSHALL B. CLINARD, THE BLACK MARKET 244 (1952).
[60] *Id.* at 261.
[61] Newman, *supra* note 7, at 230-31.

tion as more comparable to serious traffic violations than to burglary."[62] Fuller, however, stresses the necessity of *convincing* the public that white-collar crimes are more serious than conventional offenses and calls for strict enforcement of the laws.[63]

There has been a general trend away from punishment—at least severe, stigmatizing punishment—as an effective method of dealing with all sorts of social deviation. Instead, a variety of educational and social-readjustment programs have been suggested. Many of these programs, possibly effective with delinquents, alcoholics, and the like, are grossly inappropriate in white-collar crime. Modifications of them, however, have been suggested and, to a limited extent, are used by various enforcing agencies. Lane proposes an educational and experimental program involving the interaction of government and business management personnel. Pointing out the ambiguity of many regulatory laws, he proposes a clarification of provisions, improved communications between business and government, a study of social pressures and community attitudes, with an eye to building respect for the law, and a "dry-run" experimental period whenever a new regulation is introduced. The purpose of this is for "business and government to re-examine their relationship and to attempt to recreate a mutual respect which will facilitate their partnership in a democratic society."[64]

Professions have long prided themselves on their self-policing policies based, in some cases at least, upon rather elaborate codes of ethics. Since recognized professional status carries with it the highest social prestige, there has been a tendency, among diverse kinds of businesses to become "professionalized." Thus, undertakers become "morticians," house salesmen, "realtors," druggists, "pharmacists," publicity becomes "public relations," and so on. Accompanying this trend has been the formalizing of business responsibilities, obligations, and even personal conduct into ethical codes. If this trend continues, internal methods of control may make external enforcement of regulatory laws less necessary. This is assuming, of course, that the specific business or profession as a whole agrees to support regulating legislation and appropriate "ethics" are developed in a wide variety of white-collar activities. In this respect, it is interesting to note the efforts of the federal government to develop a code of conduct suitable to government personnel. The Douglas committee has already made a number of proposals, among them the plea for a permanent commission on ethics in government.[65]

If white-collar crime is intrinsic to and normative within the value structure of our society, then no punishment or treatment program will effectively eradicate it. It cannot be "cured" by externally-imposed sanctions; major value realignment becomes necessary. Caldwell, however, warns social scientists about stressing such a solution. He reproves the confusion of ethics with science and argues that no special

[62] *Id.* at 231.
[63] Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624 (1942).
[64] Lane, *supra* note 5, at 165.
[65] See PAUL H. DOUGLAS, ETHICS IN GOVERNMENT (1952).

values are, in themselves, superior to others. A sociologist may "show how to reduce social problems by removing one side or the other of a conflict of values but he cannot advocate either side and remain a scientist."[66] The desire to reduce social problems at all, however, is itself a value position, for the implicit purpose in all studies of crime is not only knowledge of lawbreaking, but control, or cure, or prevention. Much more must be known, of course, about the functional relationship of values and roles and deviant behavior. Nevertheless, the theoretical criminologist is increasingly orienting himself to consideration of values and broad social processes as inducive to many types of crime. White-collar crime, along with many other types of law violation, has been related to many essentially urban, industrial characteristics. Impersonality, materialism, intense economic competition, status-striving, and other such "American characteristics" have been labeled the root factors in all crime. If so, what can be done about them?

At this stage of criminological growth, only very speculative judgments about control can be made. In all likelihood, efforts must be directed to the distribution of our societal *rewards,* rather than our usual emphasis on control through the manipulation of *punishments.* This involves the creation of new opportunities for wealth, security, education, prestige, and self-respect by the reduction of discrimination, favoritism, and nepotism in these reward channels.[67] The price of this may be greater than we are willing to pay. Taft asks, "What liberties are we prepared to sacrifice in the interest of crime prevention? . . . Can criminogenic political corruption be eliminated and yet democracy be retained?"[68]

This really brings us to a new frontier in criminology. The concept of white-collar crime has forced the theoretician into an analysis of highly complex and very abstract relationships within our social system. No longer is the criminologist a middle-class observer studying lower-class behavior. He now looks upward at the most powerful and prestigeful strata, and his ingenuity in research and theory will be tested, indeed!

[66] ROBERT G. CALDWELL, CRIMINOLOGY 178-79 (1956).
[67] Newman, *Crime Is Big Business,* Challenge, May 1958, p. 32.
[68] DONALD R. TAFT, CRIMINOLOGY 757 (3d ed. 1956).

THE NATURE AND EFFECTIVENESS OF CORRECTIONAL TECHNIQUES

DONALD R. CRESSEY*

I

INTRODUCTION

The criminological and penological literature contains two principal conceptions of "correctional techniques." The older conception considers as correctional techniques those general systems and general programs used for handling criminals and assumed to be somehow reformative. Thus, imposition of either physical or psychological pain, in any of a variety of settings, continues to be viewed as a general system for correcting criminals. Similarly, one rationale for introducing and maintaining general programs such as probation, parole, and imprisonment has been that these programs are or will be more "correctional" than the programs used in the past. A newer conception of "correctional techniques," however, places more emphasis on the specific methods used in attempts to change individual criminals. While descriptions of such methods are by no means as precise as descriptions of medical techniques, an analogy with clinical medicine is made, with the result that utilizing the methods is called "treatment" or "therapy." Thus, within a parole or probation organization, the agents may help offenders find jobs, order them to stay out of saloons, or counsel them on psychological problems of adjustment. Because each of these maneuvers is assumed to have some efficacy in changing criminals into noncriminals, each is viewed as a treatment or correctional technique. Similarly, prisoners may be enrolled in prison schools, ordered to work, given vocational counseling and training, or engaged in individual or group psychotherapeutic interviews. These specific programs also are viewed as techniques.

This paper will be devoted to closer identification of these two conceptions of correctional techniques, to discussion of the problems involved in measuring the effectiveness of "techniques" defined in either the first or the second sense, and to exploration of possible reasons for reluctance to define "correctional techniques" more precisely.

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II

GENERAL SYSTEMS AND PROGRAMS

During the past two centuries, the principal societal reaction to criminality in the United States has been punitive. Punishment for criminals is pain or suffering intentionally inflicted by the state because of some value the pain or suffering is assumed to have. In administration of the criminal law, we have assumed that one value stemming from infliction of pain on offenders is reformation or, in a newer terminology, "rehabilitation" or "correction" of those offenders. Other values, such as deterrence, are also assumed, but it is the idea that punishment reforms which makes the infliction of pain a correctional technique in the broadest sense of the term. Consistently, the general programs used for implementing the punitive reaction to crime also have been viewed as correctional techniques. Physical torture, social degradation, restriction of wealth, and restriction of freedom are among the programs used for inflicting pain on criminals. At present, the most popular techniques of this sort are restrictions on wealth (fines) and restrictions on liberty (imprisonment).

Strangely, in the criminological literature, practically no space is given to discussion of the reformative value which the imposition of fines is assumed to have. Of seven recent criminology textbooks, two discuss only casually the possible rehabilitative effect of fines,[1] and five scarcely touch the topic at all.[2] Discussion of inflicting pain by imprisonment is a different matter. From the time of its invention, the prison has had its loud supporters and loud critics.

As a general program for dealing with criminals, the prison, like the mental hospital, performs an integrating function for society.[3] This function, in turn, is assumed to have two principal aspects. First, the prison is expected to restore society to the state of equilibrium and harmony it was in before the crime was committed. "Undesirables," "deviants," "nonconformists," "outlaws," etc., are segregated behind walls. Second, the prison is expected to contribute to social integration by reducing the occurrence of future crimes. This latter aspect of the prison's integrative function is performed in two different ways. On the one hand, crime rates are assumed to be kept minimal both by the deterrent effects of imprisonment and by the effect that imprisoning men has on reinforcing the anticriminal values of the society doing the imprisoning.[4] On the other hand, imprisonment is expected to reduce crime rates by changing criminals into noncriminals. It is the last goal of prisons which

[1] ROBERT G. CALDWELL, CRIMINOLOGY 427 (1956); WALTER C. RECKLESS, THE CRIME PROBLEM 559 (2d ed. 1955).

[2] HARRY E. BARNES & NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY (2d ed. 1951); RUTH SHONLE CAVAN, CRIMINOLOGY (2d ed. 1955); MABEL A. ELLIOTT, CRIME IN MODERN SOCIETY (1952); EDWIN H. SUTHERLAND & DONALD R. CRESSEY, PRINCIPLES OF CRIMINOLOGY (5th ed. 1955); DONALD R. TAFT, CRIMINOLOGY (3d ed. 1956).

[3] Parsons, *Suggestions for a Sociological Approach to the Theory of Organization*, II, 1 ADM. SCI. Q. 225 (1956).

[4] See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 70-110 (Free Press ed. 1949).

gives imprisonment, as a general program, the character of a "correctional technique."

It must be emphasized that support for continuing the punitive reaction to crime or for specifically implementing this reaction by imprisonment is always based on some value which punishment generally or the specific kind of punishment inflicted by the fact of incarceration is *assumed* to have. We do not have any objective, scientific evidence that inflicting pain on criminals is an efficient system for maintaining, or restoring, social integration. We do not *know* that imprisoning men deters others, reinforces anticriminal values, corrects criminals, or in some other way promotes social solidarity. Neither do we *know* that inflicting other kinds of pain corrects criminals or, generally, integrates society. Moreover, we do not *know* that inflicting pain by imprisonment or some other means is an *inefficient* system for achieving the desired ends.

In recent years, there has been a distinct trend away from the notion that inflicting pain reforms criminals. Also, it is now fashionable to argue that prisons do not correct and that, therefore, they should be abolished[5] or so modified that they become hospitals rather than places of punishment.[6] But neither the trend nor the fashionable arguments are based on scientific evidence that punishment is not effective as a general correctional technique. This is true simply because there never has been an acceptable measure of "efficiency." How much integration is necessary before a society is integrated? How low must a recidivism rate be before it can be said to be minimal? This kind of fairy-tale question can lead only to fairy-tale answers: "some," "enough," "lower that at present."

Currently, it is possible to argue, for example, that recidivism rates are high and that this has resulted because punishment is not inflicted with enough certainty or severity. It also is possible to argue that the rates are low (lower than they would be if . . . .) because we have been using some punishment, at least. Alternatively, it can be argued that the rates are high because punishment is being used, and that the rates are low because punishments have been becoming less severe. No study has ever demonstrated that one of these arguments is more cogent than the other.

Moreover, even if a fixed bench mark of some kind could be established and we could discern that the recidivism rate moved above or below it after some general program was introduced, we still could not attribute the increased "efficiency" or "inefficiency" to the change of program. For example, measuring the effectiveness of parole, as compared to the effectiveness of the earlier system of determinate sentences, is complicated by variations in use of probation and by variations in the nature of parole itself. Also, a finding that recidivism rates are higher or lower after the introduction of a parole program can easily be attributed to any of numerous conditions which might have occurred simultaneously with the introduction of the

[5] JOHN BARTLOW MARTIN, BREAK DOWN THE WALLS (1954).

[6] Karpman, *Criminality, Insanity, and the Law*, 39 J. CRIM. L. & CRIMINOLOGY 584 (1949).

program. Among these are differential arresting, sentencing and prison practices, and differentials in the total populations from which criminals are selected.

The above comments refer only to some of the difficulties involved in measuring the effect of general programs on recidivism. When we attempt to evaluate the effects on the entire society, the difficulties are compounded. For example, there is no way of knowing whether crime rates are higher today, when punishments appear to be relatively mild, than they were some years ago, when punishments were more severe. Accordingly, we cannot know whether punishment does or does not deter criminals or reinforce anticriminal values. The numerous essays pointing out the inadequacies of statistics on crime agree on at least one point: We have no measure of the crime rate; we have only what are said to be "indices" of it.[7] The "indices" we use, however, such as "crimes known to the police," are not indices at all, for the relationship between the set of statistics used as an "index" and the true crime rate cannot be determined. Since there is no way to determine how many crimes are committed, we can only guess that crime rates are increasing, decreasing, or remaining the same, and we can only guess that an "index" bears some constant relationship to what is happening to the true crime rate. This vagueness, in turn, makes it necessary for us to use only nonscientific or pseudoscientific data as bases for arguments to the effect that a general system, such as punishment, or a general program, such as imprisonment, is or is not effective. Thus, a statement that the prison is a failure because it has not efficiently performed its integrating function must be based on humanitarian, political, or other nonscientific grounds, for there can be no scientific data underlying the statement. Neither is there any scientific evidence that the prison has been a "success" in this regard.

III

SPECIFIC METHODS

By adopting the newer, more restricted conception of "correctional techniques," we do not necessarily avoid the methodological difficulties involved when general systems and programs are taken as the unit of observation. Statements regarding the effectiveness of specific procedures which are assumed to implement some general system for handling criminals, such as punishment, or which are part of some general program, such as imprisonment or parole, are subject to reservations which are identical to those placed on statements about the systems and programs themselves. This is evident from the fact that we can only assume that a specific technique such as "psychotherapy" or "strict discipline" is or is not corrective.

Currently, academicians and the members of professions involved in correctional work ordinarily assume that any *real* correctional technique is nonpunitive in nature. Only a generation ago, it was common to assume that a specific correctional tech-

[7] See, *e.g.*, Grünhut, *Statistics in Criminology*, 114 J. ROYAL STATISTICAL ASS'N 139 (1951); Sellin, *The Significance of Records of Crime*, 67 L. Q. REV. 496 (1949); and Sellin, *The Measurement of Crime in Geographic Areas*, 97 PROC. AM. PHILOS. SOC'Y 163 (1953).

nique was a method for implementing society's punitive reaction to crime, but the popular assumption at present is that a technique for inflicting punishment cannot be corrective. Because of this assumption, we are rapidly coming to substitute the word "treatment" or "therapy" for the word "correction" or "reformation." Saying that a method is a treatment or therapeutic technique is, then, simply a way of saying that the users of the technique do not make the traditional assumption that intentional infliction of pain is corrective. Psychotherapy, vocational education, counseling, and even direct financial assistance are viewed as "corrective" principally because they are nonpunitive, not because they have been demonstrated as effective methods for changing criminals into noncriminals. There is no scientific evidence that any nonpunitive correctional technique of this kind is either more or less effective than were punitive techniques such as "teaching discipline," "instilling fear of the law," and "breaking the will."

The paucity of scientific data on effectiveness or ineffectiveness of specific methods for dealing with individual criminals is not owing merely to oversight or lack of scientific interest in evaluation. On the contrary, many taxpayers have sincere interests in determining whether or not their money is well spent, and social scientists have keen interests in evaluating the effectiveness of techniques which are consistent, or even inconsistent, with some theory of crime causation they might hold. Explanation of our lack of clear conclusions about various techniques is difficult and complex. Perhaps we have few clearly-evaluative studies for the same reason that we have no crime statistics which are clearly valid: We cannot afford to let them appear.[8]

IV

Dilemmas of Evaluative Research

Precise research on the "success" of either general programs of crime control or more specific methods of correction furnishes information which is the basis for public esteem and professional reputation, as well as information about the correctional technique being evaluated. These two are very different. Personal and organizational needs supplement the societal needs being met by administration and utilization of various correctional techniques. For example, by utilizing or advocating use of particular techniques in correctional work, a person may secure employment and income, good professional reputation, prestige as an intellectual or scholarly authority, the power stemming from being the champion of a popular ideology, and many other personal rewards. An agency organized around administration of a technique may fill such needs for dozens, even hundreds, of employees, and may itself have more general, organizational needs for survival. Hence, evaluative research results which would show that the technique is ineffective and would, thereby, seriously threaten the agency or the personnel must be avoided if possible.

There are two principal ways to avoid the possibly unfavorable consequences of

[8] See Cressey, *The State of Criminal Statistics*, 3 N.P.P.A.J. 230 (1957).

evaluative research. The first, and simplest, method is to insure that such research is not initiated either by the persons utilizing the technique or by outsiders. Few personnel administering correctional programs in prisons or in parole agencies, for example, have either the research training or the time necessary for evaluating the effectiveness of their work. Further, practical correctional workers are likely to screen carefully the sociologists, psychologists, and, most of all, newspaper reporters who want to poke around in their bailiwick. This is necessary. Unsympathetic researchers or reporters are almost certain to "misunderstand" some of the events and conditions they observe, and a "scandal" could wreck the chances of doing *any* correctional work. A currently more popular method for avoiding any unfavorable consequences of evaluative research, however, is to permit or even undertake the research, while insuring that any results will be subject to interpretation as "inconclusive."

In the past decade, we have in the United States witnessed tremendous growth of interest in research which would evaluate various action programs dealing with human relations—in mental hospitals, factories, governmental bureaus, correctional agencies, and other organizations—and it is now almost essential that one "be in favor of" evaluative research if he is to maintain a reputation as a good correctional worker or theoretician. This presents the personnel utilizing correctional techniques with a dilemma. On the one hand, one's reputation depends in part upon his being in favor of evaluative research. On the other hand, such research might threaten the very existence of an agency and damage the reputations of the personnel. Fortunately, there is a solution to the dilemma. Stated simply, it is to insure that any research results can be interpreted as "conclusive" if they favor continued utilization of the technique and as "inconclusive" if they do not. For example, it is important that we be able to attack a research study on methodological grounds, pointing out that it really did not measure the effects actually being produced by the technique in whose administration we have a personal stake. Ultimately, evaluative research furnishes grounds for public opinion and, in the case of public agencies, at least, grounds for legislative action. Accordingly, if we really "believe in" our techniques, we will, as good Americans and good public servants, "fight for them."[9] One way to do this is to insure that any adverse administrative or budgetary decisions based upon the research can be countered by an exposé of a poor or incomplete research design. In a sense, we attack research methods in the behavioral sciences as being too imprecise, while at the same time maintaining research conditions which make precision impossible.

Even the behavioral scientists themselves are not immune. Because of personal investments, academic theoreticians (like the writer) are likely to argue that criminals are being corrected by any technique which is, or seems to be, consistent with a

[9] At least one school of thought maintains that public employees are not mere "servants" or agents of public purpose; they are, on the contrary, expected to have their own views of their mission and of appropriate policy. See Monypenny, *The Control of Ethical Standards in the Public Service*, 297 ANNALS 98 (1955).

favored theory of crime causation or of personality change. For the same reason, personnel of agencies devoted to rehabilitating criminals are likely to maintain that criminality is reduced by whatever it is that they are doing. Moreover, the implication is likely to be that crime is caused by whatever it is the agency is trying to correct. Administrators of a prison containing a school, a work program, individual psychotherapy, a recreational program, and strict discipline will almost inevitably maintain a "multiple-factor" notion regarding crime. They can scarcely do otherwise, for some external groups having strong interests in the prison maintain that crime is caused by educational "factors," others maintain that it is caused by economic "factors," others by personal or psychological "factors," still others by group "factors," and so on. The administrator must attempt to satisfy, or pacify, each of these groups. He is directed to believe that all the various techniques are necessary for the rehabilitation of a maximum number of inmates. He cannot risk abandoning any of them, for to do so might seriously threaten his budget and his personal prestige in the community. Consequently, it is highly desirable that any study designed to test the effectiveness of one of the techniques be subject to interpretation as "inconclusive," no matter how carefully or scientifically it is conducted.

For example, a research study which seemed to show that attending a prison school had little or no effect on the reformation of criminals would not necessarily lead to abandoning the school program. Rather, the "intangible benefits" of education probably would be enumerated, or, more likely, the study would be attacked on the ground that some variable, such as selection of the "least amenable" prisoners for education, was not controlled. In our society, education is a Good Thing, and schools must be maintained in prisons and justified as corrective ("good" men are educated; therefore, to make bad men good, educate them), whether or not there is any scientific evidence of their effectiveness.

Most of the difficulties arising in attempts to measure the effectiveness of correctional techniques stem, then, from failure to define precisely what a correctional technique is. This failure, in turn, seems to be a consequence of the fact that the groups controlling correctional agencies maintain widely divergent theories about crime causation and about what the agencies should do. Agency personnel cannot go "all out" to test one group's theory if doing so subjects them to severe criticism from that or another group. Since we do not *know* how to change criminals, we can only experiment with different techniques. Yet, as we have indicated, the fact that agencies are owned by persons with vested interests in their operation means that no experiment can be definitive.

This system for perpetuating criminological and penological ignorance has a highly useful function: It narrows the areas in which disagreement can occur. "Inconclusive" studies of the effect of correctional programs serve a useful purpose by harmonizing widely-divergent ideological and theoretical commitments held by the many persons who must deal with criminals. Personnel such as police, guards, social workers, judges, industrial foremen, teachers, clubwomen, district attorneys, min-

isters, psychiatrists, and baseball coaches have very different notions about how to correct criminals, but these differences cannot result in embarrassing public denunciations or even serious private disagreements so long as no precise evidence favorable to one or the other group arises. Just as vague, common-sense, and "umbrella" terms are useful to interdisciplinary crime commissions and research teams because they reduce the area about which disagreement can be expressed (thus indicating high degrees of consensus when, in fact, no one knows what his colleagues are talking about), so vague definitions of "correctional techniques" and vague systems for evaluating the effectiveness of such techniques are useful because they decrease the range of points on which disagreements can occur.[10]

V

A VOCABULARY OF ADJUSTMENT

Personnel maintaining either theoretical or practical interests in the control of crime and delinquency have developed a rich vocabulary of motives for justifying as "corrective" whatever it is they are doing. Perhaps we developed the vocabulary during a period when concern for precise evaluation was not great and continue it in order to "show" that any research on the effectiveness of our favored technique or program is inconclusive. So that this vocabulary can be illustrated, let us assume that a state has passed a law requiring all its parole agents to be registered psychiatrists who will use professional psychiatric techniques for rehabilitating parolees. Let us assume further that the required number of psychiatrists is found and that after ten years, a research study indicates that introduction of psychiatric techniques has had no statistically significant effect on recidivism rates—the rates are essentially the same as they were ten years earlier. The following are ten kinds of overlapping themes which are likely to be popular among the personnel with personal interests in continuing the program.

1. "You can't use rates as a basis of comparison—if only *one* man was saved from a life of crime the money spent on the program is justified."

2. "Even the New York Yankees don't expect to win all their ball games; the program certainly *contributed* to the rehabilitation of *some* of the clients."

3. "Recidivism is not a good criterion of efficiency; 'clinical observation' indicates that the criminals handled psychiatrically are 'better adjusted' than were the criminals going out of the system ten years ago and that even the repeaters are 'less serious' repeaters than were those of a decade ago."

4. "Psychiatric techniques for rehabilitation never were tried; the deplorable working conditions made success impossible—there was not enough time, case loads were too big, and salaries were so low that only the poorest psychiatrists could be recruited."

5. "You can't expect any system in which the criminal is seen for only a few hours a week to significantly change personalities which have been in the making for the

[10] *Cf.* Cressey, *supra* note 8, at 241.

whole period of the individual's life and which are characterized by deeply-hidden, unconscious problems; we can only keep chipping away."

6. "For administrative reasons, the program was changed in mid-stream; good progress was being made at first, but the program was sabotaged by the new administrator (governor, legislature)."

7. "The technique was effective enough, but the kind of criminals placed on parole changed; ten years ago the proportion of criminals amenable to change was much greater than at present."

8. "Had the technique not been introduced, the recidivism rates would be much higher than at present; the fact that there is no difference really indicates that the technique has been very effective."

9. "There are too many complex variables which were not controlled in the study; a depression (prosperity) came along and affected the recidivism rate; the newspapers gave so much publicity to a few cases of recidivism that parole was revoked even in many cases where genuine progress toward rehabilitation was being made."

10. "The study is invalid because it used no control group, but it has pointed up the need for *really* scientific research on psychiatric techniques; we must continue the program and set up a ten-year experimental study which will reassess our potential, locate some of the transactional variables in the patient-therapist relationship, determine whether some therapists have what we may term 'treatment-potent personalities' and others have what we are tentatively calling 'recidivistic creativity,' identify whether the catalystically-oriented therapeutic climate is self-defeating when occupied by reagent-reacting patients, and measure the adverse effects of post-therapeutic family-warmth variables on favorably-prognosticated and emotionally-mature dischargees."

Each of these ten themes has an equivalent which is used if the research findings are in the reverse direction. Suppose the mythical research study indicates that after the ten-year program, the recidivism rates *are* significantly lower than the rates in the earlier period. Persons using the above vocabularies are then likely to accept the validity of the study. But this does not mean that popular vocabularies for justifying existing programs in the face of adverse research findings will not be brought into play. On the contrary, supporters of some other technique, perhaps one in use before the ten-year program was started, can now use the same vocabularies:

1. "In the ten-year period, the proportion of men amenable to change was much greater than in the prior period; the parole board cracked down and placed only good risks on parole, so the change would have occurred even if the technique had not been used." (See number 7 above.)

2. "Although the technique was the one officially used, I happen to know that many of the workers informally used methods which are consistent with *my* theory rather than with the theory officially designated as the one to be implemented." (See numbers 4, 5, and 6 above.)

3. "There are too many complex variables which were not controlled in the study: the criteria for revoking paroles was changed, a depression (prosperity) was in effect ten years ago, and many parole violations were overlooked merely to prove the effectiveness of the program." (See number 9 above.)

4. "If the technique, rather than something quite incidental to it, were effective in changing criminals, an even larger proportion of the criminal group would have been rehabilitated; a medical cure is specific to a disease and cures it." (See numbers 1, 2, 3, and 8 above.)

There is no need to elaborate this list. Additional slogans to match each of those given to justify research which shows no significant differences could be enumerated.

The themes we have listed, or variations on them, are heard wherever correctional work is being evaluated. Probation and parole workers argue that probation and parole have never been tried. Prison workers argue that probation has drained off the "good convicts." Psychotherapists in any system argue that the punitive and custodial aspects of the program make it impossible to do effective work or, alternatively, that one (two, six, twenty-seven) therapists should not be expected to have much effect on a criminal population of 2,000 (1,000, 500, 100).

Significantly, variations on these themes could be used, and probably were used, in reference to correctional systems in which the primary instruments expected to induce change in criminals were techniques for inflicting pain.

To a large degree, these arguments are the consequence of labeling as "correctional" almost anything convicted criminals are expected to do. This is most easily discernible in prisons where whatever is done with prisoners to keep them occupied and/or productive and quiet is likely to be called a correctional measure. In the 1920's and early 1930's, prisoners were expected to work in prison factories, and these work programs were said to be rehabilitative. In the depression years, when the prison factories declined and prison populations increased, inmates were enrolled in prison schools. Enrollment in academic or vocational education classes became a correctional technique. Shortly after smoking privileges, canteen privileges, radios, and television are introduced—perhaps for humanitanian or custodial reasons —they are viewed as part of the correctional program. When psychiatrists, social workers, psychologists, and sociologists were employed to occupy some of the inmates' time and, further, to drain off some of the "rumbles" caused by disturbed inmates, thus contributing to a quiet, smooth-running prison, their services came to be labeled as correctional or rehabilitative. Even the salary of a man who supervises an institution's food and sanitary services is likely to be charged to the "care and treatment" (corrections) budget.

The same kind of observation can be made of general noninstitutional programs and of specific techniques within these programs. When prisons are overcrowded and inmates are, therefore, assigned to prison farms, camps, road-building crews, or parole, we argue that such assignment is a correctional technique. Alternatively, we

keep inmates out of prisons by suspending sentences and requiring recipients of this action to file a monthly report with a probation officer, naming this a rehabilitative device. Not too long ago, a parole agency might equip its officers with guns and order them to "correct" parolees by watching them carefully. In more modern agencies, we hire only men with college degrees and ask them to do something (unspecified) different from that done by gun-carrying parole officers; this something, also, is corrective.

VI

SOME THEORIES OF PERSONALITY, CRIME, AND CORRECTION

If correctional work were scientific, each correctional technique would be established on a rational basis. We would be reasonably sure that men commit crime in certain describable circumstances and not in others, and then we would set out to modify these crime-producing circumstances. Utilization of each correctional technique would be an experiment designed to test the validity of a theory of crime causation. Stated in another way, from a theory of crime causation, we would predict that certain techniques would work and others would not. If the technique were carefully administered under experimentally-controlled conditions but yet did not change criminals, we would be able to conclude either that (a) the theory on which the technique was based is wrong, or (b) the technique used was not consistent with the theory. Because correctional work is carried out under the kind of conditions we have already described—conditions which can scarcely be characterized as scientific—we are unable to draw either conclusion. The techniques in use certainly are not derived from precise statements of criminological theory.

Yet, there is a possibility that some order can be imposed on our rather disorderly conduct. Perhaps in the long run, we will find that some technique introduced for nontheoretical reasons "works." If this occurs, then we can, by working backward, develop a plausible theory of crime causation. "If practical programs wait until theoretical knowledge is complete, they will wait for eternity, for theoretical knowledge is increased most significantly in the efforts at social control."[11] Although the various techniques currently in use were not necessarily introduced for theoretical reasons, we can discern, at least, that some of them are fairly consistent with standard theories of personality, crime causation, and rehabilitation.

At present, there are two general and popular, but contradictory, principles for the correction of criminality. These two principles—the "group-relations principle" and the "clinical principle"—are, in effect, theories of rehabilitation. Some correctional techniques are somewhat consistent with one or the other of them, some with both, and some with neither. The two principles are the logical outgrowths of two alternative theories of crime causation. These theories of crime causation, in turn, are applications to a specific kind of behavior, criminality, of two even more general theories of the relationship between personality on the one hand, and social relation-

[11] SUTHERLAND & CRESSEY, *op. cit. supra* note 2, at 3.

ships on the other. We shall briefly identify the two theories of personality and the two criminological theories and then shall proceed to the two principles of reformation.

As Stanton and Schwartz have pointed out, behavioral scientists at one pole think of the "organization" of social interaction and "personality" as two facets of the same thing.[12] The person is viewed as a product of the kinds of social relationships and values in which he participates; he obtains his satisfactions and, in fact, his essence, from participation in the rituals, rules, schedules, customs, and regulations of various kinds which surround him. Moreover, the person (personality) is not separable from the social relationships in which he lives. He behaves according to the rules (which are sometimes contradictory) of the large organization, called "society," in which he participates; he cannot behave any other way.

On the other hand, behavioral scientists at the opposite pole think of the individual as essentially autonomous, and they consider his interaction with rules and regulations of society and other organizations as *submission* rather than participation. "Personality" is an outgrowth of the effect that the "restrictions" necessary to organization have on an individual's expression of his own, pristine, needs. These behavioral scientists emphasize "individual self-determination" and make a distinction between the "real" or "natural" part of the person and the "spurious," "artificial," or "consensual" part. The former is viewed as primary, free, and spontaneous; the latter (obtained from the social relationships making up society) is formal, secondary, and restrictive.

Certainly the two theories of the relationship between personality and culture are more complex than this simple statement implies, and probably few behavioral scientists maintain one or the other of them explicitly and with no qualifications. But these two ideas, in form even more garbled and unqualified than we have used, have made their way into correctional work and have become the basis, indirectly, at least, of correctional techniques.

Consistent with the first general theory is criminological theory which maintains, in essence, that criminality is behavior which the person in question has appropriated from the social relationships in which he has been participating. Crime, like other behaviors, attitudes, beliefs, and values which a person exhibits, is the *property* of groups, not of individuals.[13] Criminality is not just the product of an individual's contacts with certain kinds of groups; it is, in a very real sense, behavior which is "owned" by groups rather than by individuals. A man who participated exclusively in organizations of social relationships (groups, societies) which had a monopoly on criminality would exhibit criminal behavior, just as a person who participated exclusively in groups owning only law-abiding behaviors would be law-abiding. But since most organizations own both criminal behavior and law-abiding behavior

[12] ALFRED H. STANTON & MORRIS S. SCHWARTZ, THE MENTAL HOSPITAL 37-38 (1954). See also Cressey, *Rehabilitation Theory and Reality, II*, Cal. Youth Authority Q., no. 2, 1957, p. 40.

[13] Cartwright, *Achieving Change in People: Some Applications of Group Dynamics Theory*, 4 HUMAN RELATIONS 381 (1951).

("honesty is the best policy, *but* business is business"), the behavior exhibited by any member of the organization will depend upon his *differential participation* in one or the other of the behaviors owned by the organization. The "differential association" theory is a good example of criminological theories of this kind.[14]

Consistent with the second general theory of personality is criminological theory maintaining, essentially, that criminality is a personal trait or characteristic of the individual exhibiting the behavior. An extreme position is that criminality is a biological phenomenon. Much more popular is the theoretical position that criminality is a psychological defect or disorder, or a "symptom" of either. The criminal is one who is unable to canalize or sublimate his "primitive," individualistic, antisocial impulses or tendencies,[15] who may be expressing symbolically in crime some unconscious wish or urge arising from early traumatic experiences with the "restrictions of society,"[16] or who suffers from some other individual psychological trait or condition. In any case, criminality is the *property* of the individual exhibiting it. Perhaps the criminal is "unable to accept the restrictions of society";[17] perhaps his experiences in social relationships have given him unconscious urges which, when expressed, are criminalistic and beyond his control; perhaps they have built up in him a deep resentment of authority, latent hostility, or free-floating aggression. The essential notion here is that a "healthy" personality is one which does not own criminality because it has been permitted freely to express itself in numerous alternative ways.

The group-relations principle of reformation is based on the first polar type of theory about the relationship between personality and culture and the first kind of criminological theory. The basic notion is that attempts to change the criminal behavior of a person must be directed at modification of the groups owning the behavior. If the behavior of a man is an intrinsic part of the groups to which he belongs, then attempts to change that behavior will succeed only if the groups are somehow modified. While this principle is generally accepted in modified form by sociologists and social psychologists, there has been no consistent or organized effort to base techniques of correction on it. Many correctional practices and programs arising in the past one hundred years, however, have been indirectly, at least, consistent with it. Only in this way has the theory that changing the social relationships of offenders will modify criminality been implemented.

Among the more general programs which are, implicitly, consistent with the group-relations principle are probation and parole, where the offender is to be integrated into sets of social relationships in which criminality as a way of life is truly taboo. Similarly, even imprisonment as we now know it may be viewed as an un-

[14] SUTHERLAND & CRESSEY, *op. cit. supra* note 2, at 74-81.

[15] SHELDON & ELEANOR T. GLUECK, DELINQUENTS IN THE MAKING 162-63 (1952); RUTH JACOBS LEVY, REDUCTIONS IN RECIDIVISM THROUGH THERAPY 16, 28 (1941).

[16] Lukas, *Crime Prevention: A Confusion in Goal*, in PAUL W. TAPPAN (ED.), CONTEMPORARY CORRECTION 397 (1951).

[17] McCorkle, *Group Therapy in the Treatment of Offenders*, Fed. Prob., Dec. 1952, p. 22.

successful system for attempting to force criminals to become members of organizations which do not own criminality, but, instead, own anticriminal behavior.

Within probation and parole systems, a precise, scientific, technique which is consistent with the group-relations principle has yet to be invented. Rather than descriptions of techniques, we find statements that the individual is to be rehabilitated by "gaining his confidence and friendship," "stimulating his self-respect," "manipulating his environment," "providing a supportive atmosphere," or "changing his group relations." It is necessary to know how confidence is secured, how self-respect is stimulated, how the environment is to be changed, what a supportive atmosphere is and how it is to be created, and how group relations can be changed.[18]

The same difficulty arises in connection with techniques used within prisons. Academic and vocational education are consistent with the group-relations principle to the extent that they are directed toward changing the offender's postinstitutional group relationships. Conceivably, this is successful in some cases. A popular but apparently fallacious assumption is that passing through an educational course, such as eighth-grade arithmetic, should make bad citizens (prisoners) good, because passing through such courses is a characteristic of good citizens. But it may be hypothesized that such courses are "correctional" only to the degree that they change inmates' postrelease associations. Similarly, vocational education courses are often assumed to correct inmates by imparting vocational skills to them, thus enabling ex-convicts to earn a living "so they do not have to return to crime." But the implication of the group-relations principle is that training men to be, say, bricklayers will not automatically correct their criminality. Conceivably, however, the newly-acquired skill might in a few cases have the effect of directing inmates into essentially anticriminal social relations upon discharge.

Prison labor is subject to the same kind of analysis. Ordinarily the assumption is that nonpunitive labor of almost any kind will instill in inmates "habits of industry" so that in the postrelease period, they will work in acceptable occupations and will not commit crimes. This assumption is similar to earlier assumptions that punitive labor, or punishment of almost any kind, will "tame" the criminal and make him law-abiding. Alternatively, we can assume that work in prisons is corrective largely to the extent that it is conducive to changes in social relations upon discharge, but it also contributes to the morale of inmates so that they are psychologically better equipped for making such changes.[19] It is at least plausible that in some cases, possession of work and social skills learned in prison affects the ex-convict's social mobility and that as he moves from the status of an unskilled worker,

[18] In the writer's statement on how to change criminals in a manner consistent with the differential-association theory, it was necessary to *assume* that "small groups existing for the specific purpose of reforming criminals can be set up by correctional workers and that criminals can be induced to join them." Cressey, *Changing Criminals: The Application of the Theory of Differential Association*, 56 AM. J. SOCIOLOGY 116 (1955).

[19] SUTHERLAND & CRESSEY, *op. cit. supra* note 2, at 522.

an uneducated person, or an unemployed person to another status, his social relationships change in such a manner that his attitudes toward legal norms change.

Individual and group psychotherapy are rapidly becoming popular correctional techniques, both in prisons and in probation and parole. In individual psychotherapy, the psychological needs of individual inmates are of primary consideration, and the assumption is that correction of any psychological disorder or problem the inmate may have will change his criminality. Alternatively, adherents of the group-relations principle assume that individual psychotherapy is effective in changing criminality to the extent that it serves as a stimulant or inducement to changes in social relationships. The criminal's psychological problems may be relieved, but this has little or no effect on his reformation unless his relationships with the groups owning the criminality he has been exhibiting are modified. Conceivably, interaction with a psychotherapist is just as effective in stimulating such changes as is interaction with a teacher, tradesman, or work-crew foreman.

Group therapy as a correctional technique is not necessarily consistent with the group-relations principle. Rather, a popular assumption is that group therapy, like individual therapy, corrects criminality by correcting individual psychological disorders.[20] The emphasis in the "group work" of correctional agencies, such as probation offices, usually is on the role of the group in satisfying the psychological needs of an individual[21] or in some way enabling the individual criminal to rid himself of undesirable psychological problems. There is almost unanimous opinion that group therapy is an effective technique for treating mental patients, principally because isolated and egocentric patients are assimilated into the clinical group.[22] But the group-relations principle implies that for correcting criminals there must be more than this; and in treatment based on this principle, the aim is not mere reduction of isolation and belligerence of prisoners as they operate in the prison situation (although this is important to the smooth operation of the institution), but the provision of positive opportunities for integration into groups which own an abundance of anticriminal values and behaviors. Again, interaction in a clinical group might be considered effective as a correctional technique to the extent that it gives the participants experiences in the role of a law-abiding person and to the extent that these experiences carry over to affect the kind of social involvement the participants experience when they become ex-convicts.

The clinical principle of reformation is consistent with the second type of theory about personality and the second kind of criminological theory. If criminality is an individual disorder, then, like a biological disorder, it should be corrected on a clinical basis. Consistent with the most extreme position is the notion that the

[20] Cressey, *Contradictory Theories in Correctional Group Therapy Programs*, Fed. Prob., June 1954, p. 20.

[21] See the discussion by ROBERT G. HINCKLEY & LYDIA HERMANN, GROUP TREATMENT IN PSYCHOTHERAPY 8-11 (1951).

[22] See Clinard, *The Group Approach to Social Reintegration*, 14 AM. SOCIOLOGICAL REV. 257 (1949); S. R. SLAVSON, AN INTRODUCTION TO GROUP THERAPY 1 (1943); WILLIAM C. MENNINGER, PSYCHIATRY IN A TROUBLED WORLD 316 (1948).

criminal's anatomy or physiology is to be modified through lobotomy, castration, modification of glandular functioning, or something else. Much more popular is the theory that the individual disorders producing criminality are psychological in nature and are, therefore, to be corrected through psychological attention. But in either case, the implication is that criminality should be corrected or treated clinically. In a sense, criminality is viewed as analogous to an infectious disease like syphilis—while group relationships of various kinds are necessary to the disorder, the disorder can be eradicated in a clinic, without reference to the conditions under which it was acquired. "Individualized treatment" usually refers to an attempt to correct some characteristic of the *individual* which is believed to underlie his criminality.

Individual psychotherapy, as a system for correcting criminals, is perhaps the best example of a current correctional technique based upon the clinical principle. Similarly, social casework has been greatly influenced by psychiatry, and as a result, many of the "diagnoses," "prescriptions," and "therapies" recommended or administered by social caseworkers attached to courts, prisons, and other agencies dealing with criminals are in clinical terms.

Because criminality is an expression of psychological disorders, it is to be corrected by elimination of the disorders. But because the disorders, in turn, spring from the restrictions society has placed on "free" individuals, correction of them must be in the form of modifying the impact of the restrictions on the individual. Although this might have reformation of society as one of its implications, individual criminals are to be corrected by giving them relief from the restrictions—in the form of "ventilation," "catharsis," "acting out" and other devices for removing "tensions," "aggression," "unconscious tendencies and wishes," and other individual disorders. If criminality is an expression of an individual disorder, then attempts to change criminal behavior will succeed only if this disorder is remedied. Many of the correctional techniques and programs arising in recent times have been indirectly consistent with this principle, as well as with the group-relations principle.

Probation and parole, as general programs, permit criminals more freedom than is possible if they are incarcerated, and, therefore, these systems reduce the intensity of the war between the individual and his society. Since criminality is an outgrowth of "undue" restriction of the individual by society, it is not logical to restrict the criminal further in attempts to correct him. Probation and parole are, then, corrective, even if they are only less restrictive than imprisonment. Similarly, in recent years, adherents of the clinical principle have emphasized the importance of making the prison itself less restrictive than formerly, presumably on the assumption that a "relaxed discipline" or "therapeutic climate" will enable inmates better to "act out" and in other ways adjust to the restrictions of society.

As is the case with the group-relations principle, scientific techniques for implementing the clinical principle within probation and parole systems have not been invented. We learn that offenders are to "gain insight," "relieve emotional tensions,"

"sublimate," etc.; but we do not know precisely how this is to be done. Similarly, we must know how, or whether, these processes produce anticriminality or, at least, noncriminality. Even if we had a precise statement of how to rid criminals of emotional tensions, for example, this action might have little to do with changing the criminality of behavior.

Most "correctional techniques" used in prisons are consistent with the clinical principle only in very indirect ways. It may be hypothesized that academic and vocational education are effective only to the extent that they permit the individual to express himself, sublimate antisocial tendencies, or escape from the restrictions on an uneducated person. It is not sufficient merely to implant knowledge or vocational skills; the education in a few cases might be effective because it alleviates, partially at least, the criminals' personal psychological problems. Similarly, labor in prisons is corrective largely to the extent that it enables individual inmates to escape from the rather harsh, restrictive, unstimulating environment which characterizes many institutions.

Individual and group therapy are, of course, consistent with the clinical principle and have been introduced into correctional work by adherents of the second type of personality theory. Group therapy, for example, both enables and forces the participants to "get beneath the surface," "adjust to reality," identify their individual traits in terms such as "resentment of authority," "feelings of guilt," "frustration," and "oedipus complex," and to dissipate the "tensions" and "anxieties" arising from such traits.[23] In the words of one writer, "the future of group therapy in correctional work is bright because it offers help to a greater number of individuals and permits the release of pent-up hostility and aggression which, among more aggressive groups, frequently breaks out in open conflict."[24]

VII

CONCLUSIONS

The foregoing discussion has led to the rather obvious conclusion that most of the "techniques" used in "correcting" criminals have not been shown to be either effective or ineffective and are only vaguely related to any reputable theory of behavior or of criminality. To a degree, this is a consequence of the kinds of theories we have, as well as of the vested interests practical men and others have in the administration of specific kinds of programs. Many of the techniques consistent with the group-relations principle and the theory on which it is based could not be implemented in a society where correctional workers, like other men, work only an eight-hour day and forty-hour week. And many of the "diagnoses" which are consistent with the clinical principle and its theory call for techniques and/or programs which no correctional agency could possibly afford. What is needed is a correctional

[23] See McCorkle, *supra* note 17; Slavson, *Group Psychotherapy in Delinquency Prevention*, 24 J. ED. SOCIOLOGY 45 (1950); Fuller, *Group Therapy for Parolees*, 14 PRISON WORLD 9-11 (1952).

[24] Kesselman, Book Review, 2 INT'L J. GROUP PSYCHOTHERAPY 194 (1952).

technique which is explicitly based on a theory of behavior and of criminality and which can be routinely administered by a rather unskilled worker in the framework of the eight-hour shift. Caution is needed, however. Insulin and electric shock treatment is more popular in state mental hospitals than is individual psychotherapy, but this greater popularity is not necessarily attributable to the fact that shock therapy is more effective or more consistent with behavioral theory. Rather, it probably is popular because it can be both routinely and cheaply administered.

SOME REFLECTIONS ON THE ROLE OF CORRECTIONAL RESEARCH

ALFRED C. SCHNUR*

I

INTRODUCTION

Laws are broken millions of times each year. As one consequence, thousands of convicted law violators are turned over to correctional agencies. For what proximate and ultimate purposes have these thousands been convicted? Just what is to be done with them? Society does not seem to know. Except for apparent satisfaction with measures short of extermination or life quarantine for most offenders, there seems to be no clear-cut agreement as to ends and means to ends. Almost all the objectives ever propounded and almost all the measures ever applied in dealing with nonconformists since the beginning of recorded time are still employed today in the management of law violators. Consequently, many different and often incompatible purposes are served, and many different and conflicting techniques are utilized.

Although society does not seem to know what it really wants, correctional agencies are, nonetheless, obliged to make decisions. Both by their action and inaction, these agencies necessarily define objectives and the means of attaining them with the resources provided and within the constraints imposed by society. Thus, albeit fortuitously, correctional agencies profoundly affect not only the convicted law violator, but free society, since virtually all convicted law violators eventually re-enter free society.

Correctional agencies have a tremendous range of discretion in their management of convicted law violators, and although they never have the benefit of society's consensus in exercising this discretion, they frequently incur its adverse criticism. Ironically, there seems to be a general unawareness that much of the confusion and inconsistency in correctional objectives and the vacillation in implementing these objectives is directly attributable to society's indecision regarding the criminal and its failure to provide the means to utilize existing knowledge or to acquire further knowledge of the variables of crime to permit optimal treatment.

II

SOME LIMITATIONS OF RESEARCH

As research has helped in so many other areas, so in corrections can it help to solve the problems of defining and achieving objectives in the treatment of convicted law violators. The role of correctional research, however, is fraught with possibly

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serious misunderstanding. It is not a panacea for correctional problems—although some correctional administrators expect it and some "researchers" claim it to be. In and of itself, it will not, for example, eliminate recidivism, nor should it be expected to do so. The correlations (and intercorrelations) of the variables of recidivism may, of course, be revealed through research, as may the conditions under which recidivism increases and decreases; but whether this knowledge, if discovered, should be used and how it should be used are matters involving values which correctional policy-makers and budget-makers—not research scientists—must decide. The research scientist can help only by indicating the implications, the consequences, the costs, and the compatibility of possible decisions. In other words, research, alone, cannot actually make decisions regarding correctional means and ends; but research is the only way in which the knowledge necessary for rational decisions can be secured.

Research, too, will not always turn up manipulatable explanations for consequences. For example, previous criminal record has been found sufficiently often to pass the one-per-cent test of statistical significance to be generally accepted as one of the variables associated with recidivism. It is, however, obviously a variable about which nothing can be done, as such, in the case of a man with an extensive criminal record. This is also the case with another variable—the age at which the first crime was committed. Both of these variables represent accomplished, unalterable facts and cannot be undone. But they both constitute, along with other factors, clues of pertinence in making decisions about placement in various treatment programs and in estimating risks of recidivism, if and when the offender is released from a correctional institution.

Although objective findings disclosed by research may be unpleasant, this does not alter the fact of their existence, their consequences, or their truth. Many ideas based on these findings, however, are found "unworkable" not because of any inherent fault, but because hostile individuals tamper with the necessary conditions for their proper operation. Examples of this are often seen when, as a consequence of prison riot or other scandal, personnel representing the new penology are employed to institute reforms. Unfortunately, not all of the new staff may truly reflect the new penology, and not all of the old staff reflecting the old penology may be replaced. Those who are devotees of the old penology may busy themselves with sabotaging new ideas by failing to carry out orders, by initiating conflicting policies, and by creating situations to discredit and embarrass the new staff. By these intrusions, they may prevent the creation of the necessary conditions for the utilization of the new penology.

Research which confirms the popular is often popular; that which does not is frequently discredited on emotional grounds. For example, let us assume that research has discovered that whipping men for their misbehavior has a beneficial effect upon the recidivism rate. This conclusion would probably be accepted or rejected upon the basis of whether or not one did or did not believe in whipping, on grounds quite unrelated to its effectiveness as a correctional instrument. There would prob-

ably be individuals who would not whip, no matter how effective it might be discovered to be, because they just did not want to whip. This, of course, would not alter the effectiveness of whipping as a corrective device.

Another source of difficulty for researchers is the desire of most laymen for definite answers, not statements of probability. Statistical analysis, however, produces only the latter. These conclusions are, nevertheless, exact in a scientific, if not a lay, sense, and they advance knowledge by enhancing the accuracy of decision-making and promoting greater understanding and control of the variables of correction. In the prediction of parole and postparole behavior, for example, although the devices produced by research leave much to be desired, they do augur the possibility of tremendous advancement, since even these inferior instruments have never failed to surpass the common-sense decisions of the men who have tried to best them.

Research is neither moral nor immoral. It is amoral. Its findings can just as easily be used to defeat as to achieve any currently-selected correctional ends. There is nothing about research, as such, that ensures that its findings will be properly understood and interpreted, or even used to serve one particular goal. As a case in point, let us consider the research that has been conducted on parole and postparole behavior. This is probably the most frequently-researched area in corrections —at least the most published. The researching of the variables of parole and postparole behavior has produced a variety of instruments that can be used—and misused—in achieving particular correctional goals—say, the minimizing of recidivism. Many of these do a sufficiently good job in forecasting to pass the one-per-cent test as well as the five-per-cent test of statistical significance. This means that correctional research has enabled such accurate forecasting of parole and postparole behavior that its explanation on the basis of luck (chance) is too remote for rational men to accept.

This knowledge can, of course, be used in widely divergent ways. A parole board can use this information to reduce the recidivism rate of parolees to a minimal level, for example, by releasing only those men who are almost certain to be successful, allowing the rest to serve out their sentences. This may, of course, increase the over-all recidivism rate of the correctional system; but it will also make the parole board and its parole supervision system appear to be very good, in one sense, because they would be dealing only with successes. This appearance, naturally, would be specious, being simply a reflection of selection (*i.e.*, men with built-in probabilities of success, whether paroled or not) and having nothing to do with any causation that might be credited to the parole board action or parole supervision.

On the other hand, a parole board can use the same information to maximize recidivism by releasing only men who are almost certain to fail. Although such use is not probable, it could happen particularly, if, by a curious set of circumstances, there were one parole board member, or a whole parole board, who would like to discredit parole in the public eye through high failure rates.

As a third possibility, a parole board might have so much faith in parole that it

would regard it as the only mechanism by which men should be released from prison. As a consequence, it would seek to grant parole to as many men as possible. Feeling that the public would tolerate only a certain amount of parole violation, however, it would first determine the critical point and use this and the violation rate as guides for its decisions.

To reject men for parole on the basis of their probability of success may not, incidentally, be the way to minimize the over-all recidivism rate for the whole correctional system. It may very well be the case that the man with a low probability of success on parole would have an even lower probability of success if not paroled. Since parole boards only determine the timing of one kind of release and do not usually have the power to remand men to life quarantine, since virtually all men are released at the expiration of sentences, the relevant question, if minimizing recidivism is the objective, is to determine when and how men should be released to maximize lawful behavior, and then to act accordingly.

Most parole-prediction instruments are built out of zero order correlations, without regard to intercorrelations. This could lead, through misinterpretation, to misuse. For example, the age at release has often been found to be related to success after release—the older, the better. This might result in older men being given preference in release simply because they are older. This is what could happen by using studies that have not addressed and solved the problems of intercorrelations. Such arbitrary misuse of the zero order correlations would be a gross error, since other studies that have considered intercorrelations have found that the association between age and success disappears when previous criminal record is held constant—that is, the relationship between age and recidivism is simply a reflection of previous criminal record (which, of course, may be a reflection of something else not yet included in research studies of the variables of recidivism). Too much has frequently been attributed to these zero order relationships. Until there are adequate studies conducted using more meaningful data with multiple-correlation analysis of an appropriate type, zero order relationships must be understood as being possibly no more than mere indicators of recidivism. This does not mean that such findings are not useful as selection instruments, but only that the basis for explanation and selection may be simply the score indication, and not the factor upon which the score is based.

Some of the unfounded criticisms of prediction instruments are simply a consequence of their misuse—not a fault of the instrument, but a fault of the users who drew conclusions that were not warranted. For example, some have interpreted a high success score for parole as indicating a lesser need for close supervision than a lower score. Such a high score could, however, just as well mean a high probability of success only if there is close supervision. Since studies of parole have not researched the relationship of supervision to success, it is premature to use these prediction tables as supervision guides. For all we now know, men with low success scores may have low scores because they are of the type that are likely to be oversupervised, not because they are of the type that are likely to be undersupervised.

III

SOME POSSIBLE RESEARCH AREAS

The correctional process—probation, institutions, parole—is operated in relative ignorance today. The convicted law violator is subjected to this process because of his inability to adjust to the professed norms of society. The correctional worker does not know how to secure an adjustment for him, as is evidenced by the inexact estimates that have been made of the effectiveness of the correctional process. Correctional decisions are made upon the basis of blind hunch, faith, intuition, whim, dramatic circumstances, and so-called common sense, when they should be made upon the basis of the *uncommon* sense that emerges from a statistical analysis of data describing the offender and the process. The kind of analysis that has been successful in enabling rational decisions to be made in other areas of life cannot be made in the correctional process, however, because the research that is needed has simply not been done.

No research has been done to date that enables us either to say that one treatment program is better than another or to look at a convicted law violator and say this is the treatment he needs. There is no evidence that probation is better than institutions, that institutions are better than probation, or that parole is better than escape. (There are, for example, many dramatic instances of escapees who, having successfully reformed themselves without benefit of casework, have attained distinguished positions in their communities.) At the present time, there is no evidence that being arrested and being subjected to the correctional process aborts criminal careers or has a deterrent effect upon other potential criminals. There might even be less crime if nothing were done about it. Research could possibly shed some light, but no research conducted to date answers these questions.

Much research has been done to differentiate successful from unsuccessful probationers and successful from unsuccessful parolees. As a consequence of this research, it is possible to answer the question: How do successes differ from failures? But it is not possible, because of the way the research has been conducted, to say that the particular treatment researched is better or worse than some other program. Nor is it possible to say, now that it is known how the successes and failures differ, how the chances for success can be increased or decreased, because the factors that have been studied cannot be manipulated—they have already arranged themselves and cannot be altered in any way. In fact, in one state where prognosis is required, it is possible to make the prognosis before the convicted law violator comes to prison as accurately as if it were made the day before he left prison, because none of the experiences within the prison are taken into account in distinguishing between successes and failures. The predictive factors are things that occurred in his life before he ever came to prison and are things about which nothing can be done.

Recommendations for expensive treatment have frequently been made. Although some convicted law violators may require such treatment, it would probably be wide of the mark for many others. Instead of trying to give all convicted law viola-

tors a little of every kind of treatment in the hope that some exposure to it will be effective, effort should rather be made to determine what treatment is best, under what conditions, and for what type of person, so that each may get enough of the kind of treatment he needs—if treatment is his need—for it to take effect. These things can be objectified and studied, if the effort is taken.

What is needed is ongoing research of a character that analyzes all the effects of all the presently available treatment techniques for all those undergoing treatment. This analysis is the only kind of analysis that will enable decision-makers to act intelligently. Such research, however, will not answer the question: What is the best thing to do with this man? It will only tell what is the best thing to do with what is now being used.

The only adequate way to ascertain the relative value of the various kinds of treatment now in operation is to take a number of offenders at the earliest point of contact before conviction, preferably at the arrest level—earlier, if there were any way of doing it—and begin scientific observations. The offenders should be closely studied, differentiated into types, and followed forward for a number of years subsequent to the cessation of any legal control over them by the state. Since sentencing practice is such a haphazard procedure at present, it is to be expected that most of the various treatment types will be represented in nearly all of the dispositions available to the court and in all of the varieties of subsequent treatment given these offenders. Such a research project should exercise no control over the management of the offender with respect to the kinds of experiences that he will have, but should rather be concerned with rigorous observation. An easy, but empty, objection to such a procedure is that by the time such research has been completed, corrections will have moved ahead and will be using new and different procedures. Although change in the correctional process is to be desired as the years roll by, it is the observation of practitioners in the field that the Declaration of Principles, enunciated in 1870 at the first Congress of Correction in Cincinnati, has not yet been fully effected.

This analysis of the treatments which are being used at the present time should be supplemented by experimental research of treatment techniques not now being used, so that the old can be abandoned, changed, or amplified, and the new adopted, as indicated by their effectiveness as drawn from an adequate research analysis.

The lack of meaningful research regarding the merits of the various kinds of treatment constitutes an inhibiting factor in the progressive development of prison administration. Those who are dissatisfied with current prison operational methods and who feel that they should reflect our growing knowledge of human behavior in noncorrectional settings are at a loss to prove the validity of their beliefs. Conclusive evidence, one way or the other, is not currently available. The consequence is that the new penology and the old penology are discussed with heat at professional meetings, and decisions are made not upon the merits of the situation, but upon

the basis of who is in authority and whether or not persons can be converted to a particular belief upon no more than faith.

One valuable kind of research that is gaining popularity in an analysis of the prison community as such. This subject is probably as pertinent a consideration in determining the effectiveness of a particular treatment program as is the structure of the civilian community that is trying to implement it. It is possible—even probable—that given the same personnel and program, but given divergent structures in the prison community, the success consequences of a particular program would vary. The social interactions among inmates and between inmates and civilians need further consideration in conducting treatment evaluation research.

Correctional authorities are losing much valuable material and information by not instituting parallel research evaluation programs to determine the adequacy of each new idea put into practice, for there is no other way of gauging an idea's worth. An enterprising organization would be well advised to experiment with new ideas on a small scale, with research to determine the merits of each, rather than sweepingly to overhaul its whole correctional program before the worth of the proposed innovations have been established.

Standards of evaluation with reference to other than recidivism rates are also needed. For example, the full implications of an industrial operation within an institution should be investigated to ascertain whether or not other activities could be more beneficially carried on in its stead. Thus, if it costs an institution more to manufacture an item than to purchase it on the open market, the institution might well apportion the inmate time, staff, and equipment to other activities that would be more worthwhile from a financial standpoint as well as from one of successful adjustment after release.

One of the main deficiencies of correctional research is that so many projects are conducted as though no research had been done before, as though the researcher were ignorant of previous research. The only contribution of much correctional research, therefore, is to confirm earlier research findings. This may have a disguised value, however, since certain comparisons with respect to the stability of predictive variables can then be made. But these comparisons cannot be made without serious qualification. There is some variation in the definition of what constitutes success and what constitutes failure, and enough variation in the particular factors studied, the way in which the factors are defined, the time period, and the kind of samples studied to render the results of different studies not strictly comparable. It has been observed, however, that even where the studies are sufficiently similar for comparisons to be made, certain factors are negatively related with success in one study, positively related in another, and unrelated in yet another. It has also been observed that some factors are never significantly associated with success in any study and that some factors are always related with success in every study. A useful analysis for future research would, therefore, be to compare the findings regarding particular factors and to state the limitations of the comparisons. It might be

profitable to set up as adequate a research design as possible, with as objective definitions as possible of the variables included in these studies, with as much benefit taken of new statistical techniques as possible, to see whether such general comparisons can be confirmed. It would be more valuable if this could be done by several different investigators, in different jurisdictions, during the same time interval, in exactly the same way—and the results could then be compared.

Perhaps what is needed as much as research of the field variety is an investigation and analysis of the research that has been done—the questions that have been asked, the answers, and the associations that have been established. This would constitute a springboard for future research. At the present time, there is no place in which correctional research findings are coordinated, no easy means of referring to the findings on particular factors. The findings from correctional research today, where ascertainable, represent a veritable crazy quilt. If it were possible to map out the correctional process in all its variations and then mark the points that have been researched and the significance of the findings, there would doubtless be great embarrassment at the meager results of the characteristic sporadic *ad hoc* studies. If all of the correctional research that has been done could have been concentrated upon the total correctional process within one system, we would probably be in a better position than we are today with our present piecemeal knowledge. It is always true, of course, that research projects raise more questions than they answer; it is a shame, however, that the ratio of answers is so small for the field of corrections.

This is not to say, of course, that the research that has been done to this point, if utilized, would not improve correctional operations today. Some of it certainly would. In fact, this haphazard pattern has produced several interesting observations that would not have been possible had research been concentrated upon one system. Certain variables have been studied with reference to almost similar problems in many of the states of the United States and in many of the Western European countries. It is interesting to note that the association between almost similar variables and almost similar definitions of adjustment has been in the same direction, and upon occasion, the coefficients have been identical. Of course, this is something that could have happened by chance. It is quite unlikely, however (and, of course, this could be tested statistically), that essentially the same findings should have emerged in so many places by chance. Analysis may reveal certain universals for prediction systems. At least, variables would be suggested that should be included in any future project attempting to make analyses.

IV

SOME OBSTACLES TO RESEARCH

Correctional research, of course, has all the problems involved in other research in human behavior. It has, moreover, the problem of contending with the peculiar control over the research data exerted by official agencies. Correctional researchers,

in addition to the task of resolving the problem they are addressing, also are confronted with the task of piercing the iron curtain of a certain kind of officialdom. Research really should be easier to conduct in correctional settings than elsewhere because the convicted law violators that constitute the data are controlled; but because officialdom defines the ways in which the data under control can be handled, correctional research is often made unnecessarily difficult. Much research that could have been very meaningful has been frustrated because the original research design was altered by the correctional agency—often with the explanation (excuse) that such activity would either be disturbing to the security of the institution or damaging to the treatment program of the institution.

Chief, perhaps, among the many obstacles to the acceptance of correctional research is the fact that many agencies are defensive about their work. The characterization of their efforts as ineffective or unwarranted is interpreted as a personal affront. Consequently, they resist research findings unless they accord with their preconceived notions.

Some correctional administrators, on the other hand, are interested in research—that is, until they learn what it costs and how long it takes to secure answers. They are impatient and unwilling to pay the freight. Upon occasion, correctional administrators are so disturbed by a problem, an impending explosion, that they feel forced to turn to research for help. But then they want their answers yesterday, and they want them cheap. Research, however, cannot be tailored to meet the emotional needs of a desperate administrator. Scientific methods cannot be short-circuited. There are no bargain days for methodology.

Each classification used in preparing data constitutes a hypothesis. The validity and reliability of classifications affect the research conclusions. How reliable and valid are the classifications recorded by the correctional personnel? How much of the variation in data is to be explained by variation in the men who prepared the records, rather than by variation in the variable itself? The typical records found in correctional systems are practically useless for research purposes. They are often not worth the time and money it takes to analyze them. The lack of standards in recording is strikingly apparent when one is dealing with a recidivist with experience in several different prisons. The current prison observes him, prepares records, makes a diagnosis, and plans treatment. While much of this is in process, the current institution is awaiting the receipt of records about him from the other institutions in which he has been confined. When the various records are compared, there is so little consistency, it is often to be wondered if all these institutions were dealing with the same person. Human nature does change, but there are certain things that should remain constant from one setting to another.

Research utilizing existing records has demonstrated the inadequacy of such records not only for research purposes, but for administrative purposes. The decisions made by administrative agencies in working with these convicted law violators are at least as important as the uses made of these data for research purposes. Record-

keeping systems need tremendous overhauling to serve either administrative or research purposes. Possibly many of the erroneous common-sense generalizations made by men of experience are reflections of not just faulty thinking or the impossibility of analyzing a large number of variables mentally, but also the inadequacy of the data from which the common-sense observations are drawn.

Among the many inadequacies of correctional agency record data is the sheer absence of information. Often, when analyzing a case record, it is impossible to ascertain whether the reason for missing data is that the question was not asked, the question was inapplicable, or no information was available. The reasons for the absence of data, as well as the fact of its absence, are pertinent to research analysis. Researchers require assurance that the same questions were applied to all the cases. When there is no information in the record, there is an area of doubt.

Conclusions drawn from case studies merely represent a lower and more haphazard form of statistical analysis. Case studies of adequate quality are useful as a basis for designing a quantitative assessment of a problem. Often, however, case studies are not useful because persons making them are not sufficiently rigid and objective in securing data. Case studies that are not good enough for statistical processing really are not good enough for any kind of generalizing. Data that can be defined can be communicated and thereby be made publicly accessible. Such data can be analyzed. Data that is only privately accessible and cannot be defined cannot be made a basis for drawing reliable conclusions. Case studies tend to be interpreted according to the bias and training of the observer and not according to the data. It is very easy to find what one chooses to find in case studies. This does not mean, of course, that case studies should not be carried out; they should be carried out, however, only as a preliminary to statistical analysis.

Much statistical research has had little significance because some people have been so eager to apply formulae to problems that they have not taken sufficient time to make a qualitative study of the problem. Time should be taken for study before developing formulae. Too often, many things are learned about a problem after the project has begun and it is too late to change the research design and start over; and many ideas of this type are never followed up because so many correctional research projects are one-shot efforts.

V

SOME CAVEATS AND CONCLUSIONS

Some correctional agencies are reluctant to sanction research because of the many unqualified comparisons made of the success rates reported by research in various jurisdictions and the widespread conclusion that the success rate is an adequate indication of the relative worth of correctional agencies. Such comparisons, of course, are often unwarranted because success rates are affected by many variables that have nothing to do with the competence of personnel or the adequacy of the agency's program. Variations in success rates among different jurisdictions as re-

ported by different researchers may simply be reflections of differences in the definition of success in the different studies, or differences in the adequacy of the data collected. Some studies have definitions of success so strict that if they were applied to the average man on the street, he would probably be classified as a failure. Other studies classify a man as a success if he has not been convicted of a crime subsequent to his release from the treatment program. If two jurisdictions were compared on success rates alone, the jurisdiction that had the researcher with the more rigorous definition would probably have a lower success rate than the one with the less stringent definition, even if the former had the better program. This would be even more probable if the researcher with the more rigorous definition of success also had intensively investigated to see if the men were successful and the researcher with the less stringent definition relied solely upon the law enforcement records for his information. Differences in success rates may be more a reflection of differences in the definitions and in the thoroughness of research than a reflection of the relative effectiveness of various agencies in minimizing recidivism.

Ranking agencies in effectiveness on the basis of success rates may not even be warranted when the researches are conducted with the same definitions and the same thoroughness. This could be the case if some agencies had more offenders who were difficult-treatment types than the others had. This might affect success rates more than variations in quality of treatment. To compare agency effectiveness in various jurisdictions, it would really be necessary that the persons undergoing treatment in the various jurisdictions be social twins with respect to factors pertinent to success and failure. The treatment itself should be the only variable.

Total success rates reveal very little. What kind of people were these successes and failures to start with? For example, the higher or lower success rate of one probation department when compared with another may merely reflect a difference in judicial sentencing practice. One probation department may appear to be more successful simply because one judge was more cautious than another in granting probation. Possibly the more cautious and selective the judge, the higher the total success rate will be. Similarly, the probation department that operates in a community with a strict police department is more likely to have a case load with a large proportion of less serious offenders than the probation department that operates in a community with lax law enforcement. Consequently, cases of the former will have higher built-in probabilities of success—*i.e.*, they will be more likely to be successes, no matter what kind of supervision they are given on probation.

Research reports should include a detailed description of the program that has been studied and of the setting in which it operated. This increases the value of the report and facilitates fairer comparisons of similar programs operated by different agencies. Too often, it is assumed that if programs have the same name, they are the same. Some correctional systems have programs in name only, and others have well-developed programs. A detailed description of just what the program is makes it possible for findings to be interpreted more meaningfully.

Despite the confusion of means and ends that characterizes corrections, research can be conducted that can facilitate the formulation of more rational decisions in the management of law violators. Although much more is needed and many problems in its conduct and the utilization of its findings are yet to be solved, completed correctional research has unquestionably advanced the understanding, prediction, and control of the variables of recidivism and has helped in the determination and the achievement of correctional goals.

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